

In the Supreme Court  
Appeal from the Court of Appeals  
Kirsten Frank Kelly, Joel P. Hoekstra, and William C. Whitbeck, JJ.

DENNIS LEE TOMASIK,  
Defendant-Appellant,

v

Docket No. 149372

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee.

Brief on Appeal - Appellant  
ORAL ARGUMENT REQUESTED

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Court of Appeals No. 279161  
Kent County Circuit Court No. 06-003485-FC  
(Hon. Donald A. Johnston, III)

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## **BASIS OF JURISDICTION AND STATEMENT OF MATERIAL PROCEEDINGS**

This Court's jurisdiction to hear this matter is pursuant to Const 1963, art 6, §4 and MCR 7.301(A)(2). Appellant Dennis Lee Tomasik was convicted in the Kent County Circuit Court after jury trial, and a Judgment of Sentence was entered June 5, 2007. Appellant, through his first appellate attorney, Christopher P. Yates, filed a Brief on Appeal in the Michigan Court of Appeals on October 10, 2007. Appellant then, through current appellate counsel, filed both a Supplemental Brief on Appeal (October 30, 2008) and a Motion to Remand (October 8, 2008) in which he asked the Court of Appeals to remand to the trial court for an evidentiary hearing on ineffective assistance of counsel. In addition, Appellant asked that all treatment and educational records of the complainant in this case be turned over to current appellate defense counsel, or minimally, be inspected by the trial court in an *in camera* review, and that the records reviewed be sealed by the trial court and sent to the appellate court for review under *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

On November 6, 2008 the Court of Appeals partially granted Mr. Tomasik's motion to remand, and ordered an evidentiary hearing on ineffective assistance of counsel pertaining to Appellant's trial counsel's failure to "produce expert evidence to rebut the prosecutor's experts." The appellate court also allowed Mr. Tomasik to move for an *in camera* review of complainant's counseling records (Appellant's Appendix (App) p. 20a).

Appellant then filed a Motion for New Trial and Motion for Discovery with the trial court on November 11, 2008. The evidentiary hearing was held in the Kent County Circuit Court before the Honorable Donald A. Johnston, III on Thursday, December 18, 2008, and continued

on Thursday, February 12, 2009. Judge Johnston denied the Motion for New Trial from the bench on February 12, 2009 (MT 2/12/2009 65; App p. 85a).

That day the trial court promised to conduct a review of all available counseling records, and asked counsel to provide assistance and information (*Id.* at 28, 50-52; App pp. 48a,70a-72a). The very next day this attorney sent a four-page letter providing all information known to the defense regarding any counselors treating the complainant, and asked the trial court to look for evidence of deceit, lying, manipulation, previous false accusations, and the consistency of various clinician's observations with respect to the complainant's behavioral problems.

After waiting nearly five months, the trial court issued an order stating, essentially, that no *Stanaway* review would be conducted, despite what was earlier promised. Indeed, the trial court's July 6, 2009 order simply indicates that it conducted the same time-limited review it conducted prior to trial (App. p. 89a). Appellant filed a Supplemental Brief after Evidentiary Hearing with the Michigan Court of Appeals on July 13, 2009. That court affirmed Appellant's conviction in an opinion dated January 26, 2010 (App p. 90a).

Appellant then filed an Application for Leave to Appeal in this Court on February 24, 2010. In an order dated March 9, 2011, this Court vacated the judgment of the Court of Appeals and remanded this case back to the trial court after reviewing documents never before turned over to Appellant (App p. 105a). This Court directed the trial court to "disclose to the defendant the March 26, 2003 report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003 form authored by Denise Joseph-Enders." This Court then added that, "after disclosing these documents to the defendant, the trial court shall permit the defendant to argue that a new trial should be granted."

On June 8, 2011 Appellant filed a Renewed Motion for New Trial in the Kent County Circuit Court. The motion was argued before the trial court on July 29, 2011 and, on August 10, 2011, the trial court issued an order denying a new trial (App p. 106a).

Appellant then timely filed a supplemental brief with the Michigan Court of Appeals, along with motions to re-open the case and allow Appellant to file the supplemental brief on September 7, 2011. That court again affirmed Appellant's conviction in an opinion dated November 29, 2011 (App p. 108a).

Appellant filed his second Application for Leave to Appeal in this Court on January 12, 2012. On April 3, 2013, this Court issued an Order (App p. 114a) holding this case in abeyance pending the decision in *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013). Then, in an Order dated November 6, 2013 (App p. 115a), this Court vacated portions of the Michigan Court of Appeals November 29, 2011 opinion, and remanded this case back to the Court of Appeals. This Court directed the Court of Appeals to reconsider the three issues that are currently under review, along with specified aspects of ineffectiveness of trial counsel.

On December 9, 2013 Appellant timely filed a supplemental brief in the Court of Appeals. On December 13, 2013, the Court of Appeals ordered the parties to file supplemental briefing on the specified issues, and allowed Appellant's supplemental brief. On December 27, 2013 the prosecution filed a supplemental brief. On April 22, 2014 the Court of Appeals again affirmed Appellant's convictions. *People v Tomasik*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 279161, 2014 WL 1614469) (App. 117a).

Appellant filed his third Application for Leave to Appeal in this Court on May 29, 2014. In an order dated March 25, 2015, this Court granted leave to appeal (App 132a). This Court ordered the parties to include the first three issues raised in this brief.

## **STATEMENT OF QUESTIONS PRESENTED**

- I. Whether Appellant Tomasik was denied a fair trial in violation of the due process clauses of the United States and Michigan Constitutions (US Const, Ams V, XIV; Const 1963, art 1, § 17) when the Kent County Circuit Court improperly admitted the entire recording of an interrogation the police conducted with Mr. Tomasik which contained inadmissible and highly prejudicial statements, and where the trial court failed to give appropriate cautionary/limiting instructions regarding those statements.

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

The Court of Appeals answers, “No.”

- II. Whether Appellant Tomasik was denied a fair trial in violation of the due process clauses of the United States and Michigan Constitutions (US Const, Ams V, XIV; Const 1963, art 1, § 17) where the Kent County Circuit Court committed plain error in admitting Thomas Cottrell’s expert testimony regarding child sexual abuse accommodation syndrome under current MRE 702.

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

The Court of Appeals answers, “No.”

- III. Whether Appellant Tomasik was denied a fair trial in violation of the due process clauses of the United States and Michigan Constitutions (US Const, Am V; Const 1963, art 1, § 17) where the Kent County Circuit Court erred in denying Appellant’s motion for a new trial based on newly discovered impeachment evidence.

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

The Court of Appeals answers, “No.”

- IV. Whether Appellant Tomasik was denied the effective assistance of counsel guaranteed by the United States and Michigan Constitutions (US Const, Am VI; Const 1963, art 1, § 20) where trial counsel failed to: investigate and present a psychological expert on key issues supporting the defense; investigate, interview, or call potential defense witnesses; properly initiate and conclude review of reports and records; properly cross-examine complainant on prior inconsistent statements; and object to the introduction of inadmissible and highly prejudicial evidence.

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

The Court of Appeals answers, “No.”

## **STATEMENT OF FACTS**

Dennis Lee Tomasik was convicted in the Kent County Circuit Court, after jury trial, the Honorable Donald A. Johnston, III presiding, of two counts of CSC, 1<sup>st</sup> degree (MCL 750.520b[1], under 13). On June 5, 2007, Judge Johnston sentenced Mr. Tomasik to two concurrent terms of 12 to 50 years imprisonment.

### **A. Initiation of allegations**

On February 4, 2006 Theo Jensen (Theo), the complainant, disclosed to his counselor, Julie Schaefer-Space, that Appellant had sexually abused him a decade earlier (T III 49; App p. 173a). The abuse was claimed to have occurred over a two-year period.

Theo's disclosure came only days after Theo was caught on a surveillance videotape at Comstock Park High School rifling through the belongings of the high school cheer team and ultimately stealing money from the coach's purse (T III 46-47; App pp. 170a-172a).

Theo admitted to stealing the money, but only after his plan to lie about it was foiled by the video footage. Theo, responding to a question whether he pled guilty to the theft, testified: "The first time, no, because I was—I thought they didn't have anything on me but when I seen the tape and I was like, yeah, that's me" (T III 48; App p. 172a).

Having already been suspended from school and facing criminal charges, Theo "disclosed" the alleged sexual abuse.<sup>1</sup> The very same day that Detective Martin received the referral, the charges against Theo were dropped.

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<sup>1</sup> Theo was exposed to the idea of sexual abuse from an early age. Theo testified at the preliminary exam that his mom would ask "if you know anybody who's been [sexually] abused or something, you should tell somebody" (PE 3/31/06 48; App p. 155a). At trial, Theo added that his mother talked with him about sexual abuse "not in the last couple of years, my whole life" (T III 89; App p. 233a). Furthermore, Theo's therapist had, a week earlier, invited him to tell her if anything had ever happened to him (T IV 109; App p. 245a).

**B. Theo's inconsistencies**

On February 24, 2006 Theo was interviewed, for the first time, by Detective Martin at the Children's Assessment Center. During the interview, Theo told Detective Martin that the first time he was allegedly abused by Appellant he was at the Tomasik house playing with Ethan Tomasik, Appellant's son, who is the same age as Theo (App p. 485a).<sup>2</sup> Theo claimed that Appellant asked Theo to accompany him into Ethan's bedroom where Appellant forced Theo to perform oral sex on him (App 486a).

Theo told Detective Martin that Appellant forced Theo to "touch his penis with his hands" (App p. 485a-486a). Theo also alleges that Appellant "did me in the rear with his penis" and that this "occurred *two times*" (App p. 486a) (emphasis added). Theo was very clear that it only happened twice. Indeed, Theo described that it hurt worse the second time and that he thought Appellant may have worn a condom the first time (App p. 485a-486a).

Theo concluded by telling Detective Martin that he was sexually abused "almost every time he was at Ethan's residence" and that he was at the house "up to" three times per week over a two year period. (App p. 486a). Extrapolating those figures, Theo claimed to be abused by Mr. Tomasik "almost" 312 times over the two years in question. Theo, however, could not remember Appellant's name (App p. 485a).

The next time Theo told his story was on March 31, 2006 at the Preliminary Exam held in the 63<sup>rd</sup> District Court, the Honorable Steven R. Servaas presiding. It was substantially different. Theo again alleged that he was at the Tomasik home playing with Ethan the first time he was

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<sup>2</sup> This reference to a police report, and references throughout to witness affidavits and work records, pertain to materials submitted by present counsel from 2008 through 2014 to the trial court, the Court of Appeals and this Court in support of a request for a *Ginther* hearing, which was granted in part, and later for an expanded *Ginther* hearing, which was never provided. See Issue IV, *infra*.

abused. Only in this version Appellant, after he had called Theo into Ethan's room, anally raped him (PE 3/31/06 9-13; App pp.138a-142a). This was different from his original story where Appellant had forced Theo to perform oral sex on him.

Additionally, Theo now claimed that Appellant had anally raped him 10-20 times (PE 3/31/06 13; App p. 142a). This is a dramatic increase from the two times he originally stated. This time, Theo omitted the specific details about how the second time hurt worse, and that he thought that Appellant may have worn a condom the first time.

Theo went on to claim that he was forced to give oral sex to Appellant 50-60 times over the two-year period (*Id.* at 15; App p. 144a). Theo claimed that, in sum, Appellant abused him 70-80 times (*Id.* at 38; App p. 162a). While still a large number of alleged abuses, this is vastly different than three times per week over two years, which he had previously stated.

Theo, at the preliminary exam, went on to testify that he could remember one incident "really clear" (*Id.* at 14; App p. 143a):

Me and my father were riding our bikes around the block and I wanted to go and hang out with Ethan, and Dennis was working on a vehicle, and my dad and him talked maybe five, ten minutes, and then my dad went on the rest of the bike ride by himself. And I went inside with Ethan's dad, and then Ethan was outside playing by himself, and we went into Ethan's bedroom and he said what he said, it was okay, don't tell nobody. **Then, in this – instant, he made me put his penis in my mouth and not my butt that one.**" [Emphasis added] (*Id.* at 15; App p. 144a).

At trial, Theo also claimed to remember the incident "really well" (T III 39; App p. 163a). But the stories have shockingly different endings:

I can remember one time really well. Me and my dad were goin' on a bike ride and I seen Ethan playin' and I asked if I could stop by and my dad said yeah and that he would finish riding his bike on his own. And my dad talked to Dennis. Dennis was working on his truck at the time. And after my dad left he kind of came over and started talkin' to me and Ethan and asked me to come inside and I went into Ethan's bedroom, where he told me the same thing, that it was okay, everything was gonna be fine. He took my pants off and then his,

flipped me so my face was down in the bed **and started pushing his penis in my butt . . .**” (*Id.* at 39-40; App pp. 163a-164a)(Emphasis added).

Theo was never asked which version was true.

Also at trial, Theo returned to his original story and claimed Appellant forced Theo to give him oral sex the first time (*Id.* at 38; App p. 162a). This was the third time he told the story of the first encounter with Appellant. The first time he told Detective Martin he performed oral sex on Appellant. At the preliminary exam he testified that Appellant anally raped him, and at trial reverted back to his first version of the story.

Theo also had a hard time keeping track of the number of times he was abused. Theo testified, on direct exam, that he was forced to perform oral sex “a lot” (*Id.* at 39; App p. 163a). Also on direct, Theo said he really didn’t know how many times he had been anally raped (*Id.* at 40; App p. 164a). This was the third time he had been asked about the number of times he was anally raped. The first time he told Detective Martin, very definitively, that it had happened two times. At the preliminary exam it had changed to 10-20 times. On direct Theo could not remember.

Not surprisingly, the fourth time he was asked this same question, Theo gave his fourth different response. During cross-exam, he testified that he was anally raped by Appellant 50-60 times (*Id.* at 61; App p. 185a). To make sure, Theo was asked a second time. He confirmed that it happened 50-60 times (*Id.*; App p. 185a).

This version of the story holds up until the very next time he is asked. The prosecutor, in trying to clear up the inconsistencies, had the following exchange on re-direct exam:

- Q: Mr. Nunzio asked you about pages 13 through 15 of the preliminary exam transcript. You were under oath at that time too?
- A: Yes.
- Q: All right. On page 15 you mentioned 50 to 60 times and that’s what he asked about. But on page 13, when you talked about when he put it in your butt, as you put it, my next question; “Approximately how many times between the ages of six

- and eight did that occur between you and the defendant,” regarding putting it in your butt, and you indicated how many times?
- A: 10 to 20.
- Q: All right. And then on page 15, when Mr. Nunzio was talking to you, what were you talking about the 50 to 60 times?
- A: Do I say it?
- Q: Sure.
- A: Oh, okay, he told me to swallow it.
- Q: Okay, and so that’s with the oral?
- A: Yes (*Id.* at 109-110; App pp. 233a-234a).

The prosecutor led him through his previous testimony, but Theo never clarified which version was correct. He also failed to indicate how many times he claimed to have been abused. Assuming that Theo reverted back to his preliminary exam version of the story, he would be claiming that he was anally raped 10-20 times.<sup>3</sup>

Inexplicably, Mr. Tomasik’s trial attorney, Damian D. Nunzio, never asked Theo about these inconsistencies.<sup>4</sup>

### **C. Interview with Mr. Tomasik**

A week after Theo gave his first version of his story to Detective Martin, the detective phoned Appellant and asked him if would come to the station to answer some questions. Mr. Tomasik agreed, and met her on February 23, 2006 at the Kent County Sherriff’s Department. The interview/interrogation took place on February 23, 2006. It was recorded and played for the jury at trial (T V 36; App p. 313a).<sup>5</sup> Mr. Tomasik was not represented by an attorney. A

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<sup>3</sup> Note that Theo earlier testified that he bled as a result of the anal rapes the first dozen or so times. Presumably then, the low number of the range must have been greater than 10 (T III 61; App p. 185a).

<sup>4</sup> Mr. Nunzio made one failed attempt to elicit previous testimony from Theo. He asked one question regarding his preliminary exam testimony, but allowed Theo the opportunity to read the transcript to refresh his memory, and never questioned Theo about the inconsistency (T III 60; App p. 184a).

<sup>5</sup> The CD of the interview played for 39 minutes (T V 36; App p. 313a). A transcript of the CD was introduced as an exhibit and given to the jury so they could read along (*Id.* at 35-36; App p. 487a).

transcript of the interview was produced and can be found in Appellant's Appendix at pp. 487a – 529a. During much of the interview, Detective Martin engaged Mr. Tomasik in small-talk before she finally revealed that she worked in the Family Services Unit (*Id.* at 17; App p. 503a).

The jury repeatedly heard Detective Martin tell Mr. Tomasik that she had investigated the entire case, and verified the veracity of Theo's accusations. During the interview she stated to Appellant "I'm not going to lie to you about anything" (*Id.*; App p. 503a). She then told him that her investigation focused on the Jensen family (*Id.* at 20; App p. 506a). She told him that she investigated the heck out of the case and knows everything that has gone on (*Id.*; App p. 506a).

The jury also heard Detective Martin tell Mr. Tomasik that "everything I know, with this family has provided me with, that can be backed up, everything that I know, I know happened, so my question to you today are not, hey did this happen or didn't happen, because...I know, it happened, ok" (*Id.* at 22; App p. 508a).

She went on to add:

I know things happen when Theo, their boy came over to your house years ago, ok, I know that, there's no if's, and no butts about it, none. I'm not going to ask if things happened between Theo and you, because I know that they did happen between you and Theo, ok. What I need to determine, what is going to make this so that I can understand this, is you need to tell me the reasons, on how things happen, how things started, between you and Theo. (*Id.* at 23; App p. 509a)

Detective Martin continued to describe the crime she was accusing Mr. Tomasik of. She stated "what I want to concentrate on is, or are those times back ten (10) years ago, nine (9) years ago over a course of time for about year and a half, two (2) years that Theo used to come over to your house...to see your son" (*Id.* at 24-25; App pp. 510a-511a). Mr. Tomasik repeatedly explained to Detective Martin that he had no idea what she was getting at. Detective Martin then

said "...Theo in particular, there's no reason why he could come up with a conjured up story, about you..." (*Id.*; App pp. 510a-511a).

Later in the interview, Detective Martin asked Mr. Tomasik, after he said that she was wrongfully accusing him, "what am I accusing you of?" and he replied "child molestation or something" (*Id.* at 29; App p. 515a). Detective Martin then stated "when did that come up? How, how did you think of that?" (*Id.*; App p.515a).

#### **D. Expert witnesses**

Other than Theo's stories of abuse, and the use of Mr. Tomasik's interrogation, the prosecution's case centered around four expert witnesses. Dr. Randall Clark was called to discuss the lone piece of physical evidence presented at this trial - that Theo had been treated for slight anal bleeding during the time of the alleged abuse and diagnosed with an anal fissure, likely caused by constipation (T IV 154; App pp. 276a). Dr. Debra Simms, a pediatrician, testified that "the finding of an anal fissure does not rule out that the child has been sexually abused. So finding an anal fissure does not mean that the child was sexually abused or was not sexually abused because anal fissures can occur from many causes" (T III 125; App p. 243a). Indeed, the treating physician, Dr. Randall Clark, who had examined Theo, testified that he concluded the fissure was caused by constipation (T IV 154; App p. 276a).<sup>6</sup>

Dr. Simms, helping to explain the lack of physical evidence, testified that often there is no physical evidence of abuse after anal rape (T III 125; App p. 243a).

The next expert called was Thomas Cottrell (T IV 3; App p. 278a). Though admitting it is better to actually have contact with the alleged victim (*Id.* at 16-19; App pp. 294a-297a), Mr.

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<sup>6</sup> Dr. Clark later testified that, had he known about the abuse, the fissure "certainly would be compatible with sexual abuse" (T IV 157; App p. 276a), yet admitted that he did not suspect that Theo was sexually abused (T IV 163; App p. 277a).

Cottrell admitted he had never met Theo before testifying (*Id.* at 6; App p. 284a). Yet he attempted to lend credibility to virtually every aspect of Theo's story (*Id.* at 11-14; App pp. 289a-293a).

Mr. Cottrell then turned his attention towards Appellant. He tried to explain how a middle-aged man with no criminal record, and with no prior instances of sexually deviant behavior, might fit the profile of a sexual predator. He testified that typically sex offenders "very carefully select their victims" and "across the board offenders specifically select victims" (*Id.* at 15-16; App pp. 293a-294a). He went on to say he often sees cases where the offender only abused one child (*Id.*; App p. 294a).<sup>7</sup> Again, Mr. Cottrell's preparation for testifying regarding the actions of Mr. Tomasik did not include actually meeting Mr. Tomasik.

The jury, having already heard that Appellant's actions in this case were consistent with those of a pedophile, were later told that Theo "had all of the marks of being a child who was sexually abused" (T IV 109; App p. 245a). This testimony came from Julie Schaefer-Space, Theo's counselor, to whom he made his initial disclosure. Ms. Schaefer-Space was a sexual abuse specialist who, at the time of trial, had treated "over 300 individuals and families

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<sup>7</sup> The jury was also able to hear Detective Martin allude to the fact that often predators do not have any history of abusive behavior. During the Martin interview, after Mr. Tomasik declared his innocence and stated that if he was a child molester then why hadn't he done this before with other children, she replied: "You know Dennis, there are a million guys that I've talked to, that have sat in the same chair as you ... say the same thing" (App p. 524a). She also told him that "I've talked to a lot of people that have a clean as a whistle past that maybe some things have happened" (*Id.* at 28; App p. 514a).

specifically related to sexual abuse<sup>8</sup>” (*Id.* at 106; App p. 246a). Amazingly, she came to this conclusion far before Theo’s disclosure.<sup>9</sup>

Ms. Schaefer-Space did not bother to acquire any of Theo’s past psychological records to help formulate her opinion (*Id.*), but instead relied on Theo’s bad behavior to conclude that Theo had the characteristics of a child that had been sexually abused (*Id.* at 109; App. 249a). Armed with her conclusion, Ms. Schaefer-Space continued on with the therapy, though she was careful not to mention sexual abuse to Theo too soon:

You’re looking and asking questions about things that have gone on and at that point in time if you go too quickly with a teenager, they will shut down, so [sexual abuse is] not something that we had talked about at the forefront. It’s certainly something that you’ll always have in your mind’s eye when you’re seeing that there’s destructive behavior... But again, if you bring that up, you can – he can shut down and not be as open and connecting. (*Id.*; App p. 249a).

The week before Theo’s criminal activity, which set off the disclosure, Schaefer-Space told Theo “You can use language like if there’s any—if there’s anything that’s ever happened to you that you have not shared or that you haven’t felt safe in talking about, you know, it’s okay to do that. I have a relationship with your mom and dad, they’re coming to therapy, we’re all --- you’re all together. And it’s a safe environment, you’re safe now, and you can share that information, if anything has ever gone on for you”<sup>10</sup> (*Id.*; App p. 249a).

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<sup>8</sup> The record never makes clear why Theo was brought to a sex therapist months before these allegations were initially disclosed.

<sup>9</sup> Ms. Schaefer-Space began counseling Theo in 10/05 and the disclosure occurred in 2/06 (T IV 108; App p. 248a). At trial, she was asked if sexual abuse was brought up during that time (*Id.*) She replied that it had not, but she had it in her “mind’s eye” (*Id.* at 109; App p. 249a).

<sup>10</sup> Theo’s mom had discussed sexual abuse with Theo his entire life, and she had repeatedly asked him if he had been sexually molested (PE 3/31/06 48; App p. 172a; T III 89; App p. 213a).

**E. Review by a Ph.D. forensic clinical psychologist**

In August of 2008, after reviewing the trial transcripts in this matter, current appellate counsel initiated review by a licensed Ph.D. forensic clinical psychologist, Jeffery T. Kieliszewski, of Human Resource Associates in Grand Rapids, Michigan.

Dr. Kieliszewski reviewed extensive sections of transcripts and records regarding this case, and concluded that the testimony provided by complainant Theo Jensen's treating therapist, Julie Schaefer-Space, was seriously flawed, highly prejudicial, and easily challenged if defense counsel had investigated and presented a qualified forensic psychologist to provide an assessment (MT 12/18/08 40-42; App pp. 385a-387a). This was due to the fact that Schaefer-Space's knowledge base was limited, she suffered from confirmatory bias and clinician's illusion, and she was laboring under a serious conflict of interest (*Id.*).

Dr. Kieliszewski pointed out that the truthfulness of Theo's "disclosure of abuse" was never scrutinized (*Id.* at 23; App p. 368a). Dr. Kieliszewski detailed the lack of scrutiny by the mental health clinicians in this case in relation to the possibility of false allegation, and cited substantially to the empirical literature to support and document his concerns in this regard. Dr. Kieliszewski noted that Theo's widely divergent reporting suggests, according to the literature, the strong possibility of a false allegation (*Id.* at 23-24; App p. 368a).

Dr. Kieliszewski testified that "the defense could have, and I will say, and will provide an opinion, should have utilized a forensic consultant or an expert witness to educate the jury about the potential of a false allegation, given all the data and evidence that was present" (*Id.* at 80; App p. 425a). This testimony would have countered Schaefer-Space's claims that Theo presented "a typology of a sexual abuse victim."

Dr. Kieliszewski went on to assess Schaefer-Space's failures in this case. He noted that Schaefer-Space put the claim of sexual abuse to the jury without ever once critically evaluating

it. This was particularly troublesome and particularly prejudicial, and the failure of Appellant's trial counsel to counter her claim that Theo had "all the marks of being a child who was sexually abused" was devastating. Dr. Kieliszewski testified that Ms. Schaefer-Space's conclusion that Theo's psychological problems, including depression, acting out, anxiety, destructive behavior and lack of focus, showed all the marks of a sexually abused child, was simply wrong (*Id.* at 40-41; App p. 385).

Acting out behavior can come from things like under-socialization, attention deficit hyperactivity disorder, conduct disorder, character problems, substance abuse, anger management or emotional modulation difficulty, there's a variety of different things that could explain that behavior [other than sexual abuse]." (*Id.* at 40; App p. 385)

Contrary to Ms. Schaefer-Space's testimony, there is not "a profile or a specific cluster or set of markers that would indicate symptoms of sexual abuse." (*Id.* at 32; App p. 377a).

Dr. Kieliszewski also testified that Ms. Schaefer-Space suffered from clinician's illusion (*Id.* at 30; App p. 375a). Clinician's illusion is when "someone spends a great deal or a significant majority of their time working with a particular type of disorder or patient, that they tend to have notions about that particular illness or clinical problem that don't necessarily readily meet with what the empirical research says (*Id.* at 38-39; App p. 383a). That can result or manifest in them seeing a disorder there that really isn't there, that they tend to estimate the prognosis for the clinical problem as different from what the research says" (*Id.*). Put another way: "If everything is a nail, the only tool you have is a hammer" (*Id.* at 39; App p. 384a). Both Schaefer-Space and Mr. Cottrell were specifically at risk for clinician's illusion.

Dr. Kieliszewski could have also provided valuable testimony to counter Mr. Cottrell's testimony that Appellant fit the profile of a pedophile because it was not uncommon for a middle-aged man with no criminal record, and no prior instances of sexually deviant behavior, to abuse a child (*Id.* at 45; App p. 390). He explained that one does not typically acquire an

appetite to offend prepubescent children in middle-age (*Id.* at 46; App p. 391). “That particular type of problem is often traced back to all kinds of potential developmental or deviant behavior patterns. You don’t, all of a sudden, wake up at 40 years old and have an appetite towards sexually abusing prepubescent boys” (*Id.*; App p. 391)

Dr. Kieliszewski would have also been able to explain to the jury that, contrary to Mr. Cottrell’s testimony, there was no grooming in this case (*Id.* at 47; App p. 392). Grooming typically involves gaining the trust of the selected victim. This can be achieved by developing a friendship with the potential victim (*Id.*; App p. 392). However, the evidence in this case showed no signs of grooming. The initiation of the alleged criminal sexual relationship just happened one day (*Id.* at 48; App p. 393).

Finally, Dr. Kieliszewski noted the importance of conducting a full review of the extensive treatment records of Theo Jensen, the existence of which was apparent from the file material that was available<sup>11</sup> (*Id.* at 34-38; App pp. 379-393).

**F. Mr. Tomasik’s trial counsel**

Mr. Tomasik was represented at trial by defense attorney Damian D. Nunzio. The day after Appellant’s “interview” with Detective Martin, Mr. Tomasik contacted Mr. Nunzio to inquire about representation. Mr. Nunzio was hired by the Tomasiks a few weeks later, in early March, 2006.

During his representation of Mr. Tomasik, Mr. Nunzio failed to contact a single potential defense witness, including the people he called to the stand (see App pp. 530a – 555a, affidavits of potential witnesses). In September of 2006, the Tomasiks compiled a list of potential witnesses at the request of Mr. Nunzio. Shortly thereafter, they submitted it to Mr. Nunzio who

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<sup>11</sup> This Court, after reviewing the very records Dr. Kieliszewski noted, ordered the trial court to turn over to Appellant two critical reports never viewed by the defense.

then created his defense witness list, which he filed with the trial court on March 30, 2007. The defense witness list contained thirty potential witnesses, along with an unnamed “expert witness” listed as the 31<sup>st</sup> possible witness (App p. 716a).

During the seven months that Mr. Nunzio had the names of the witnesses, he failed to contact a single one. At trial, Mr. Nunzio called five witnesses, Robert Barringer, Mary Jones, Christie Hadden, Harold Hadden, and Kimberly Tomasik. Other than Ms. Tomasik, Mr. Nunzio had never contacted, interviewed, or even spoke to any of the other four witnesses before they were on the stand (App pp. 542a – 548a).

At the *Ginther*<sup>12</sup> hearing, Mr. Nunzio claimed to have been ready for trial “for a long time” but did not receive much of the discovery in this case until “right before trial” (MT 12/18/08 104-106; App pp. 449a - 551a).

Mr. Nunzio did not make any efforts to contact a defense psychologist to investigate whether such an expert would be beneficial to Mr. Tomasik’s defense (*Id.* at 107; App p. 452). Mr. Nunzio claimed that he did not need to consult an expert regarding Mr. Thomas Cottrell, one of the prosecution’s experts, because “I have had his transcripts from the past. I have reviewed them. I know how he testifies.” (*Id.* at 129; App p. 474a).

Mr. Nunzio did not know what was meant by the terms “clinician’s illusion” or “confirmatory bias,” yet later testified that he was “satisfied with her [Ms. Shaeffer-Space’s] testimony in part regarding the nature of disclosure” so he did not believe there were any indications of confirmatory bias or clinician’s illusion (*Id.* at 108-110; App pp. 453a 455a). Most importantly, Mr. Nunzio testified that he never consulted with a forensic clinical psychologist (*Id.* at 107, 112; App p. 452a, 457a).

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<sup>12</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

**G. Release of limited counseling records**

On October 8, 2008, Appellant first asked the Michigan Court of Appeals to turn over **all** treatment and educational records of the complainant to current appellate defense counsel, or minimally, to order inspection by the trial court *in camera*, and that the records reviewed be sealed by the trial court and sent to the appellate court for review under *People v Stanaway*, *supra*.

On November 6, 2008 the Court of Appeals partially granted Mr. Tomasik's motion to remand, and ordered an evidentiary hearing on ineffective assistance of counsel pertaining to Appellant's trial counsel's failure to "produce expert evidence to rebut the prosecutor's experts." That court also allowed Mr. Tomasik to move for an *in camera* review of complainant's counseling records.

Appellant filed a Motion for Discovery with the trial court which was denied on February 12, 2009 (App p. 21a). The trial court never performed the expanded review of the counseling records. The Court of Appeals also denied Appellant's request to review the complainant's counseling records (January 26, 2010 opinion; App p. 90a)

It was not until Appellant filed an Application for Leave to Appeal with this Court on February 24, 2010 that Appellant was given access to critical counseling records. In an order dated March 9, 2011, this Court vacated the judgment of the Court of Appeals and remanded this case back to the trial court after reviewing the documents never before turned over to defendant. This Court directed the trial court to "disclose to the defendant the March 26, 2003 report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003 form authored by Denise Joseph-Enders." This Court then added that, "after disclosing these documents to the defendant, the trial court shall permit the defendant to argue that a new

trial should be granted.” Each of these documents provided critical evidence of Theo’s propensity for lying and deceit.

**1. March 26, 2003 report authored by Dr. Timothy Zwart (App p. 720a)**

Dr. Timothy Zwart was working at Pine Rest Christian Health Services. The report indicates that Theo was referred to Pine Rest by Tim Zielinski, at North Kent Guidance Services. Dr. Zwart administered a number of tests on Theo, including: developmental history questionnaire, school history questionnaire, child attention profile (CAP), behavior assessment system for children (BASC). Dr. Zwart also conducted clinical interviews with Mrs. Jansen (Theo’s mother) and Theo.

Dr. Zwart provided background on Theo, including the death of Theo’s grandfather when Theo was 6 years old. Dr. Zwart labeled this event as a “stressor,” and noted that Theo struggled with the death of his grandfather. Dr. Zwart also pointed out that Mrs. Jansen “remembered Theo making statements at that point about wanting to die. Theo did receive some school social work services at that time.”

Throughout school, Theo tested high for intelligence, but Dr. Zwart noted that one area of weakness was his memory. Theo was diagnosed with learning disabilities and Attention Deficit/Hyperactivity Disorder.

Dr. Zwart’s report was conducted when Theo was in the 6<sup>th</sup> grade. As part of Dr. Zwart’s analysis he received input from Nancy Jenson, Theo’s guidance counselor at school, and Denise Joseph-Enders, Theo’s resource room teacher. Dr. Zwart noted that both expressed significant concerns for Theo. Part of the concern was based on Theo’s behavior during school. Theo could not be trusted alone in the hallways, and required constant supervision. Theo also had “extreme difficulty concentrating on the task before him.”

More importantly to this case, Dr. Zwart's report indicates that Theo consistently engaged in deceitful behavior. Theo would lie to teachers so often that it was hard to distinguish when he was telling the truth and when he was lying. "He [Theo] has the teacher team rather baffled. **He will lie and it becomes difficult to know truth from fiction.**" Emphasis added.

Furthermore, Theo seemed to relish in his deceitful behavior. He was "quick to blame the adult in charge when asked to take responsibility for his actions." And Dr. Zwart noted that, when explaining his aberrant behavior, Theo's "overall energy level and affect became much brighter and he almost appears to revel in this type of mischief."

Dr. Zwart described many of the lies Theo had created and stated that "this all adds to the sense that he does not know truth from fiction himself." Dr. Zwart also stated that Theo has difficulty with "impulse control and self regulation" as measured by the GDS Delay Task.

**2. March 1, 2003 form and questionnaire authored by Denise Joseph-Enders (App p. 730a).**

Denise Joseph-Enders was Theo's resource room teacher. In March of 2003 she filled out a CAP form evaluating Theo's behavior. She described a young man who consistently lied. "Theo has been lying to parents and teachers for so long he distorts reality. He is offended that we don't trust him, but he has repeatedly broken our collective trust."

Also important to this case is that Theo was "**quick to blame the adult in charge when asked to 'own' his actions.**" (Emphasis added). Ms. Joseph-Enders indicated that Theo sought the attention of his peers, and usually sought it with negative behavior.

Other teachers were involved in filling out this form. While the handwriting is unclear, it appears the other staff members involved were Nancy Jansen, Stacy Kenelty and Lisa Ear. These women also found Theo to be dishonest and deceitful. They wrote that Theo "lies very often, so no one knows truth from fiction. The problems have been prevalent since he was very young..."

They also found that “Theo seems to be attracted to situations that cause trouble for himself. He has been caught in the middle of telling lies so often that it’s difficult to know when he is telling the truth.” They wrote about specific lies Theo had told about having a parole officer, and shooting at targets shaped like people.

Even more disturbing, they found that “Theo’s sense of what is real does not match what the majority of us see as reality. He seems to really believe some of his untruthful statements.”

Other facts will be noted as needed in the course of the issue discussions.

### **SUMMARY OF THE ARGUMENT**

This is an innocence case. Dennis Tomasik, now 51, was a hardworking tool technician who lived in a tiny house in Grand Rapids, Michigan, with his loving, stay-at-home wife, and two accomplished teenage children, when, in 2006, he got the call that would ultimately destroy his entire family. A teenage neighbor, who had a longstanding reputation in the community as a trouble-maker and a liar, had gotten into some serious trouble with thefts at school, and had made up a fantastic, uncorroborated claim that Dennis Tomasik, who had no prior criminal record, and no history of pedophilia, had molested him a decade earlier. The accusation proved to be highly inconsistent over time.

The teenage neighbor, though the numbers changed constantly, claimed he was brutally raped as much as 300 times over a two-year period in the tiny Tomasik home, screaming a lot, while the rest of the Tomasik family did nothing, even suggesting that the entire Tomasik family “knew what was going on” (T III 69; App p. 193a). However, in addition to being willing to testify to Dennis Tomasik’s good character, and his accuser’s reputation for lying, many in the neighborhood would have testified that 1) the accuser was almost never at the Tomasik home during the period in question and 2) Dennis Tomasik was almost never home during the relevant time frames (App pp. 530a-556a). Work records corroborate this (App pp. 557a-715a). And a

Ph.D. forensic psychologist has laid out a strong case of false allegation, and has shown why “experts” for the prosecution were unqualified, conflicted, and just plain wrong when they testified that the troubled teenager had “all the markings” of an abused child.

Because the jury never heard these critical facts, Mr. Tomasik was wrongly convicted and sentenced to 12-50 years in prison. They never heard any of this because trial defense counsel did absolutely no pre-trial investigation or preparation. He never contacted a single one of a long list of witnesses provided by Mr. Tomasik and his family, despite the fact that he filed their names on a defense witness list, and despite the fact that he had a report, prepared by the investigating detective at the request of the prosecutor, outlining the valuable testimony of many of these individuals. Shockingly, he **never even spoke to the few witnesses he did put on the stand**. He never investigated use of a psychological expert. He never cross-examined the troubled teenage accuser about the wild inconsistencies in his claims over time.

He also never objected when the prosecutor played an audio-taped interrogation session where the investigating detective tells the jury that she “investigated the heck out of the case” and knows Mr. Tomasik did it. This is a clear case where the prejudicial nature of the investigator’s statements exceedingly outweighs any probative value. The fact that the jury heard the investigating officer, with years of experience and superb investigative skills, announce that she had talked with the complainant and his family and knew for certain that the complainant was telling the truth undoubtedly, and wholly improperly, tipped the credibility contest in favor of the complainant (see Issue I, *infra*).

Mr. Tomasik was also denied a fair trial when the trial court erred in admitting improper expert Child Sexual Assault Accommodation Syndrome (CSAAS) testimony claiming that the complainant’s actions in this case comported with those of a victim of sexual abuse, and improper testimony declaring that Appellant's alleged conduct was entirely consistent with that

of a sexual abuser (see Issue II, *infra*). This testimony was inadmissible and the trial court had a duty to keep it out. Appellant will show that CSAAS is of no (or questionable at best) scientific validity, and thus its reliability is problematic under either MRE 702 or *Kowalski* standards controlling expert testimony. More significantly, the expert testimony espoused in this case about CSAAS was considerably more misleading than helpful to the jury. The probative value of CSAAS was substantially outweighed by its prejudicial effect in two ways: First, the behavioral stages of CSAAS are clearly not specific to child victims of sexual abuse. Not only do the behavior patterns of CSAAS also apply to children who are not victims of sexual abuse, as they are quite general, but some victims of sexual abuse exhibit no symptoms whatsoever. Second, even when CSAAS is offered to rehabilitate a child victim's credibility, and not to substantiate claims of abuse, juries will likely draw the impermissible inference that the complainant who exhibits symptoms of CSAAS has been sexually abused. The syndrome cannot be considered helpful to the trier of fact when it cannot reliably distinguish between abused and non-abused children. This improper expert testimony using CSAAS evidence to explain that the complainant "had all the markers of a sexually abused kid," along with the improper testimony from the investigating officer telling the jury that she was 100% sure that Appellant was guilty, combined to improperly vouch for the complainant, and undoubtedly had a profound effect on this trial as it was ultimately a credibility contest.

Appellant was further prejudiced when the trial court erred in not having released two critical reports before trial which showed complainant's propensity to lie (see Issue III, *infra*). Indeed, the reports are critical because they clearly show that the complainant did not understand the difference between fact and fiction, and would make up lies about adults to avoid getting into trouble. These reports were critical evidence, and it was plain error for them not to be turned over before trial.

As can be seen by a close examination of the arguments outlined in Appellant's original leave applications before this Court, as well as the argument contained in this pleading, the Court of Appeals has glossed over critical facts with respect to every issue raised by Appellant. In a close case which hinged completely on the credibility of a troubled teenager, the erroneous determinations of the Court of Appeals on each issue are continuing to cause material injustice as Appellant serves a lengthy sentence of imprisonment.

## **ARGUMENTS**

**I. APPELLANT TOMASIK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS (US CONST, AMS V, XIV; CONST 1963, ART 1, § 17) WHEN THE KENT COUNTY CIRCUIT COURT IMPROPERLY ADMITTED THE ENTIRE RECORDING OF AN INTERROGATION THE POLICE CONDUCTED WITH MR. TOMASIK WHICH CONTAINED INADMISSIBLE AND HIGHLY PREJUDICIAL STATEMENTS, AND WHERE THE TRIAL COURT FAILED TO GIVE APPROPRIATE CAUTIONARY/LIMITING INSTRUCTIONS REGARDING THOSE STATEMENTS.**

**STANDARD OF REVIEW:** The trial court did not rule on this point below, though, generally, constitutional questions are reviewed de novo. *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997); *People v McPherson*, 263 Mich App 124; 687 NW2d 370 (2004).

**ISSUE PRESERVATION:** This issue was not preserved by objection below; Appellant asserts, in Issue IV, that this failure was ineffective assistance of trial counsel.

Criminal defendants possess a due process right to a fair trial, which may be denied by improper evidentiary rulings. See US Const, Ams V, XIV. See also *Walker v Engle*, 703 F2d 959, 962-63 (CA 6, 1983). State court evidentiary violations may rise to the level of a federal constitutional deprivation by rendering a trial fundamentally unfair. *Estelle v McGuire*, 502 US 62; 112 S Ct 475; 116 L Ed 2d 385 (1991); *Crane v Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986).

At trial, the prosecution introduced into evidence the CD, along with a transcript, of a February 23, 206 "interview" conducted by the investigating detective with Mr. Tomasik (App,

pp. 487a – 529a). The interrogation did not merely consist of questions and answers. During the course of the interrogation, Detective Martin made numerous statements/representations which the jury was able to hear and read including, *inter alia*, the following:

1) That she would not lie to him. (This supported everything else she told Appellant.)  
 “The cases that I work, um, are pretty sensitive cases, ok. And, again I’m telling you Dennis no matter what I say to you is going to be honest, **I’m not going to lie to you about anything...**”  
 (App, p. 503a ).

2) That Martin was a very good detective who had been working in the detective bureau for several years and this case “wasn’t the first case that [she had] looked at” so that “you feel confident enough to know that ...my investigation skills are there.” She went on to explain that she is very “thorough” about what she does, and that is why Appellant was there being interrogated (App p. 508a).

3) That she had “**investigated the heck out of it [the case] and knows everything that’s gone on**” (App p. 506a).

4) That “I know a lot of things about this, ok. **“Everything that I know, with [sic] this family has provided me with, that can be backed up,** everything that I know, I know happened, so my question to you today are not, hey did this happen or didn’t happen, because...**I know, it happened,** ok” (App p. 508a)

5) “So my whole, thought about today, and to be up front and honest because I said that’s what I was going to do, is to tell you that there’s not going to be a yes or no, because I already know, there’s no reason ta [sic], to beat the door down on that one, **because I already know, that the answer is yes, things happened, ok. And you know what I’m talking about.**”

(*Id.*) After Mr. Tomasik indicated that he did not know what she was talking about, Detective Martin again stated “You know what I’m talking about” and then added “Ok. I already know

what I need to know. An [sic] I, and I'm not, hope your [sic] not thinking that I'm kinda [sic] of playing a game here..."(*Id.*)

6) That "All right. Well let me tell you this, Dennis I **know things happen when Theo, their boy came over to your house** years ago, ok, I know that, there's no if's, and no butts about it, none. I'm not going to ask if things happened between Theo and you, because **I know that they did happen between you and Theo**, ok. What I need to determine" is "how things started, between you and Theo" (App p. 509a).

7) That there was no possible reason why Theo would come up with this story. "Is there a reason why this family out of the blue, not just the family but, Theo in particular, **there's no reason why he could come up with a conjured up story, about you**, I mean, what would he get from that" (App p. 511a).

These statements/representations, both individually and collectively, were inadmissible and highly prejudicial. Their introduction denied Mr. Tomasik a fair trial. Indeed, the inadmissibility and the prejudicial impact of this evidence are so obvious that it was both prosecutorial misconduct for the prosecutor to have introduced this CD into evidence and ineffective assistance of counsel not to object. Even if this Court holds that the CD was admissible, in the absence of cautionary/limiting instructions, these statements were clearly more prejudicial than probative. And there can be no doubt that the improper introduction of these statements undermined the reliability of the verdict in this case.

This Court, in an Order dated April 3, 2013, held this case in abeyance pending a decision in *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013), a similar case which dealt with this issue. In that case, this Court held that the trial court abused its discretion by allowing the detectives' statements commenting on the claimant's credibility to be presented to the jury. Because the errors in that case undermined the reliability of the verdict, this Court vacated the

defendant's convictions. The errors in this case were more egregious than those presented in the *Musser* case, and therefore Appellant's convictions must also be vacated.

Just like in this case, the detective in *Musser* repeatedly announced that the complainant was telling the truth about the incident, and that there was no reason for the complainant to make up a story. "[I]t's pretty credible when she tells us, 'Hey, he touched ... me here' ... That's pretty credible; that's pretty detailed. Again, if there's no reason for her to make this crap up, why would she say it?" *Id.* at 344. In this case Detective Martin was allowed to tell the jury: "All right. Well let me tell you this, Dennis I **know things happened when Theo, their boy came over to your house** years ago, ok, I know that, there's no if's, and no butts about it, none. I'm not going to ask if things happened between Theo and you, because **I know that they did happen between you and Theo**, ok. What I need to determine" is "how things started, between you and Theo" (App p. 509a). She added "Is there a reason why this family out of the blue, not just the family but, Theo in particular, **there's no reason why he could come up with a conjured up story, about you**, I mean, what would he get from that (App p. 511a).

This Court held the statements in *Musser* were improper, and unanimously reversed Musser's conviction. The impropriety of Detective Martin's assertions in this case was more egregious. While the detective in the *Musser* case stated that the defendant **probably** did the acts in the case based simply on the interview with the complainant, Detective Martin repeatedly stated that she **knew** that Appellant had committed the crime. Martin went on to explain to the jury that, through her expert investigation skills, and after investigating the heck out of the case, she was able verify with proof that Theo was telling the truth about everything he said Appellant did to him.

These statements were not admissible because they demonstrated not only a belief that the complainant was telling the truth and that Mr. Tomasik had, in fact, committed the sexual

acts alleged, but that there was substantial proof of the crime – proof known by Detective Martin but unknown to the jury. Had the prosecution elicited the statements/representations at issue during the direct examination of a police officer witness, there can be little dispute that this would have constituted reversible error<sup>13</sup>. The fact that these improper and highly prejudicial statements were made during a police interview does not lessen their prejudicial impact or make their presentation to the jury proper.

[T]here is “no meaningful difference” between allowing an officer to comment on another person's credibility while testifying at trial and allowing the officer to make the same comments on a tape recording in the context of an interrogation interview. See, e.g., *Washington v. Jones*, 117 Wash.App. 89, 92, 68 P.3d 1153 (2003) . **The logic behind this approach is that, in either case, the jury hears the police officer's opinion and “clothing the opinion in the garb of an interviewing technique does not help.”** *Id.* See also, *Washington v. Demery*, 144 Wash.2d 753, 765, 30 P.3d 1278 (2001) (Alexander, C.J., concurring); *Id.* at 767, 30 P.3d 1278 (Sanders, J., dissenting); *Kansas v. Elnicki*, 279 Kan. 47, 57, 105 P.3d 1222 (2005) (“A jury is clearly prohibited from hearing such statements from the witness stand ... and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.”); *Commonwealth v. Kitchen*, 730 A.2d 513, 521 (Pa. Super., 1999) (explaining that accusing a defendant of lying during an interrogation is “akin to a prosecutor offering his or her opinion on the truth or falsity of the evidence presented by a criminal defendant” or his or her opinion regarding the guilt of the defendant, neither of which is admissible at trial). Accordingly, under this rationale, such statements must be redacted from a recording before it is submitted to a jury. *Id.* at 522. [*Musser* at 351-352, (emphasis added)]

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<sup>13</sup> “In evaluating a statement's probative value against its prejudicial effect, a trial court should be particularly mindful that when a statement is not being offered for the truth of the matter asserted and would otherwise be inadmissible if a witness testified to the same at trial, there is a “danger that the jury might have difficulty limiting its consideration of the material to [its] proper purpose[ ].” *Musser, supra* at 357 quoting *Stachowiak v Subczynski*, 411 Mich 459, 464–465; 307 NW2d 677 (1981).

These statements indeed should have been redacted from the interrogation recording before it was presented to the jury because the statements improperly vouched for the complainant's credibility.

The Court of Appeals, in their latest opinion in this case dated April 22, 2014, ignored this Court's reasoning in the *Musser* case when concluding that the trial court did not err in allowing the jury to hear these highly prejudicial statements.<sup>14</sup> *People v Tomasik*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 279161, 2014 WL 1614469, App p. 117a). The Court of Appeals held, without any explanation, that the improper statements made by Detective Martin were needed to provide context to Defendant's answers during the interrogation. App. p. 123a. This is simply not the case. Detective Martin's prejudicial statements are mainly found between pp. 20-25 of the transcript of the interrogation (App pp. 503a-512a). During this portion of the interview, Detective Martin barely even bothers to get a response from Mr. Tomasik before moving on to another prejudicial statement of how sure she is that the complainant is telling the truth in this case. During this portion of the interview Mr. Tomasik answered in mainly one-word denials to Martin's highly prejudicial statements. No context was needed as there was nothing of substance said by Mr. Tomasik during this part of the interview.

The Court of Appeals concluded that this case differs from the *Musser* case in "several aspects" (App p. 123a). These aspects are so arbitrary that the Court of Appeals is essentially announcing that a defendant must have the same exact facts as *Musser* for that case to apply. First, the court indicated that Mr. Tomasik was "not told why he was being interviewed, whereas in *Musser* the detectives told the defendant at the outset the purpose of the interview." *Id.* This

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<sup>14</sup> The Court did at least acknowledge that "this issue presents a close question" (App 124a).

has absolutely no bearing on whether the jury should have heard the improper statements at issue in both this case and *Musser*.

The Court of Appeals also stated that *Musser* differs from this case because Detective Martin testified that the statement that she “investigated the heck” out of the case was merely a “figure of speech.” *Id.* This was stated twice in their opinion. (App pp. 121a, 123a). This is completely irrelevant. First, Detective Martin made the comment about it being a “figure of speech” well after the jury had already heard the interview.<sup>15</sup> Furthermore, while she does say it was a figure of speech, she quickly added that “obviously I investigate my cases **thoroughly**...” (T V 60; App p. 315a) (emphasis added). There is no difference between a detective explaining to a jury that she “investigated the heck” out of a case and therefore she knows the defendant is guilty or that she “thoroughly investigated the case” and she knows that the defendant is guilty. The bottom line is that Detective Martin repeatedly represented that what she found during her “investigation” provided conclusive evidence that the complainant was telling the truth and that Mr. Tomasik was guilty. This is precisely the type of statement that this Court held was improper in the *Musser* case.

Finally, the Court of Appeals claims that this case differs from *Musser* because “Martin did not testify that she had received special training in interviewing techniques or that children of the age of the complainant knew the difference between telling the truth and telling a lie.” (App p. 124a). While Detective Martin did not testify at trial that she had special training in interview techniques, this fact was made very clear during the recording played for the jury. Indeed, the jury heard that Detective Martin was a very good detective who had been working in the detective bureau for several years and this case “wasn’t the first case that [she had] looked at” so

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<sup>15</sup> The interview was played at T V 36 (App p. 313a) and that comment was made at T V 60 (App p. 315a).

that “you feel confident enough to know that ...**my investigation skills are there.**” She went on to explain that she is very “thorough” about what she does, and that is why Appellant was being interrogated (App p. 508a) (emphasis added).

Detective Martin testified at trial that she had interviewed both the complainant and his parents **before** her interview with Mr. Tomasik (T V 60; App p. 315a). Thus the jury would likely believe a detective when she asserts that she knows, based on her interviews and investigation, that the complainant is telling the truth. Detective Martin also testified that, before interviewing Mr. Tomasik, she had “other information that [she] was looking for” which hinted that there was evidence that she was gathering against Appellant. (*Id.*; App p. 315a). This substantiated for the jury her statements that she knows “a lot of things about this, ok. Everything that I know, with [sic] this family has provided me with, that can be backed up, everything that I know, I know happened, so my question to you today are not, hey did this happen or didn’t happen, because...I know, it happened, ok” (App p. 508a). She also indicated that she “knows everything thats gone on” (App p. 506a) and “I already know, that the answer is yes, things happened, ok. And you know what I’m talking about.” (*Id.*)

After Mr. Tomasik indicated that he did not know what she was talking about, Detective Martin again stated “You know what I’m talking about” and then added “Ok. I already know what I need to know. An (sic) I, and I’m not, hope your (sic) not thinking that I’m kinda (sic) of playing a game here...” (*Id.*) She continued: “All right. Well let me tell you this, Dennis I know things happen when Theo, their boy came over to your house years ago, ok, I know that, there’s no if’s, and no butts about it, none. I’m not going to ask if things happened between Theo and you, because I know that they did happen between you and Theo, ok. What I need to determine” is “how things started, between you and Theo” (App p. 509a).

The points raised by the Court of Appeals do not distinguish this case from *Musser*. In fact, these points help show that the impropriety of the statements played for the jury is far greater in this case.

Even if this Court finds that the statements were somehow relevant, there is no doubt that whatever small amount of probative value they had was far outweighed by the overwhelming prejudicial impact these statements had on the jury. Under MRE 403, a trial court has a “historic responsibility” to “always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced before admitting such evidence.” *People v Robinson*, 417 Mich at 665, 666; 340 NW2d 631 (1983). And “[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

This Court has correctly warned that the danger of unfair prejudice against a defendant in a child-sexual-abuse case is heightened. Such a case needs to be given “special considerations” given “the reliability problems created by children’s suggestibility.” *Musser, supra* at 358.

The *Musser* Court went on to add that “an out-of-court statement made by an investigating officer ‘may be given undue weight by the jury’ where the determination of a defendant’s guilt or innocence hinges on who the jury determines is more credible—the complainant or the defendant. *People v Prophet*, 101 Mich App 618, 624; 300 NW2d 652 (1980).” *Musser, supra* at 358. This is precisely the situation in this case. This case was a credibility contest, and the improper statements undoubtedly influenced the jury.

Other than repeating the pre-*Musser* stock reasoning of providing context for Defendant’s interview, the Court of Appeals provided no analysis as to what probative value these statements had in this case, and there was certainly no analysis on whether whatever probative value there

was outweighed the clearly prejudicial nature of the statements. This is a clear case where the prejudicial nature of the statements exceedingly outweighs any probative value. This case was a credibility contest between Mr. Tomasik and the complainant. The fact that jury heard the investigating officer, with years of experience and superb investigative skills, announce that she “investigated the heck out of the case” and knew for certain that the complainant was telling the truth undoubtedly, and wholly improperly, tipped the credibility contest in favor of the complainant. This Court announced in *Musser* that this very type of evidence should not, and cannot, be admitted.

In *People v Nelson*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2015 (Docket No. 319139, 2015 WL 774476), the Court of Appeals denied relief on a *Musser* issue. That court discussed that *Musser* did not apply on those facts because the case was **not** a mere credibility contest, and the trial court allowed the defense to redact prejudicial parts of the defendant’s interrogation video.

This is not a case where the jury was confronted with a “one-on-one credibility contest[.]” *People v. Douglas*, 496 Mich 557, 579; 852 NW2d 587 (2014)...The jury had ample, untainted evidence on which to base its guilty verdicts. We also note that this is not a case where the trial court admitted the entire interrogation video with no attempt to weed out inadmissible statements. *Musser*, 494 Mich. at 354. Rather, the trial court painstakingly went over each of defendant's objections. As defendant concedes, the trial court agreed with some of his objections, such as striking blatant references to his criminal history. [*Nelson, supra.*]

This case, however, is a case where the jury was indeed confronted with a credibility contest. And this was a case where the jury was able to hear the interrogation video in its entirety. This clearly violates the tenet of the *Musser* holding.

At a minimum, even if the trial judge somehow had determined that the unedited CD was admissible, and that it was not more prejudicial than probative, he should have given a strong limiting instruction telling the jury, *inter alia*, the statements made by the officer during the

interview were not evidence, were not offered for the truth of the matter asserted, and could not be considered when determining Mr. Tomasik's guilt or innocence. See MRE 105, *People v Moorer*, 262 Mich App 64; 683 NW2d 736 (2004).

This Court unanimously overturned the conviction in *Musser*, and the *Musser* Court **did** administer a limiting instruction, but this Court held that even that did not cure the error. *Musser* at 364. As noted, the jury in this case received no limiting instruction.<sup>16</sup>

The jury should have been instructed that it is not improper for police officers to lie to individuals they are interviewing, especially where they start the interview by claiming they are not lying, and that when police officers receive training about conducting interviews, one of the things they learn is how to use false or misleading statements to get the individual they are interviewing to make inculpatory admissions.

The jury should have been further instructed that they had to assume that all of the statements the interviewing officer made, inter alia, about believing the complainant and that Mr. Tomasik had done what the complainant said he had done were not supported, and that they must completely disregard all of those statements because giving them any weight would violate Mr. Tomasik's right to a fair trial. The jury should have been further instructed that to the extent they believed that the officer who interviewed Mr. Tomasik had formed an opinion as to either the complainant's credibility and/or Mr. Tomasik's guilt, they had to disregard that opinion because it was not evidence, it is improper for a police officer to express an opinion as to the credibility of witnesses and/or the defendant's guilt or innocence, police officers have no special ability to determine who is telling the truth or whether the defendant is guilty, and that it is the

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<sup>16</sup> The Court of Appeals opinion stated that Defendant did not request one which, on these facts, is clearly ineffective assistance as argued in Issue IV.

responsibility of the jury to determine guilt or innocence based on the evidence presented at trial.

Other jurisdictions have recognized that there is “no meaningful difference” between allowing an officer to comment on another person's credibility while testifying at trial and allowing the officer to make the same comments on a tape recording in the context of an interrogation interview. See, e.g., *Washington v Jones, supra*. The logic behind this approach is that, in either case, the jury hears the police officer's opinion and “clothing the opinion in the garb of an interviewing technique does not help.” *Id.*; see also *Washington v Demery, supra*; *Kansas v Elnicki, supra* (“A jury is clearly prohibited from hearing such statements from the witness stand ... and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.”); *Commonwealth v Kitchen, supra* (explaining that accusing a defendant of lying during an interrogation is “akin to a prosecutor offering his or her opinion on the truth or falsity of the evidence presented by a criminal defendant” or his or her opinion regarding the guilt of the defendant, neither of which is admissible at trial). Accordingly, under this rationale, such statements must be redacted from a recording before it is submitted to a jury. *Id.* at 522; *Commonwealth v Bolish*, 381 Pa 500, 525–26; 113 A2d 464 (1955) (admission of tape recording, in which among other things the district attorney several times accused defendant of lying, deprived defendant of a fair trial).

Finally, in *State v Cordova*, 137 Idaho 635; 51 P3d 449 (2002), the Court of Appeals of Idaho first found that an officer's statement on videotape that he was an expert in deception detection was improperly admitted, stating:

As opposed to the ‘unremarkable interview’ observed in *Dubria [v Smith]*, 224 F3d 995 (CA 9, 2000)], the second officer's comments regarding his training and experience gave him the same aura of superior knowledge that accompanies expert witnesses in other trials. Accordingly, the second officer's assertions that Cordova was not being truthful appeared to be the comments of an expert, rather than

the comments of a lay person investigating a crime. Although we agree with the court in *Demery*, that the tactics employed in Cordova's interrogation are acceptable interrogation tactics, we do not agree that certain comments, which may be permissible for purposes of interrogating a defendant, are also admissible in court for consideration by the jury. (*Cordova, supra* at 641).

The *Cordova* court next found that the officer's comments did not give context to Cordova's answers, since they were not connected to a question, but instead made as to a statement to Cordova. *Id.*

The highly prejudicial nature of the statements/information improperly presented to the jury, when combined with the weakness of the prosecution's proofs and the complete failure on trial counsel's part to present a defense in this case, compels a finding that Mr. Tomasik did not receive his due process right to a fair trial.

**II. APPELLANT TOMASIK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS (US CONST, AMS V, XIV; CONST 1963, ART 1, § 17) WHERE THE KENT COUNTY CIRCUIT COURT COMMITTED PLAIN ERROR IN ADMITTING THOMAS COTTRELL'S EXPERT TESTIMONY REGARDING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME UNDER CURRENT MRE 702.**

**STANDARD OF REVIEW:** This Court “may review forfeited claims of error when the forfeited claim involves plain error affecting the defendant’s substantial rights.” *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888, 891 (2000).

**ISSUE PRESERVATION:** There was no objection to Mr. Cottrell’s testimony during trial, but its admission is still subject to review on appeal for plain error. *Id.* The failure to object here was clearly ineffective assistance of counsel (Issue IV, *infra*).

**A. Summary of the argument**

Appellant Tomasik was convicted of two counts of CSC 1 at a trial where the one sided presentation of expert testimony bolstered the story of the alleged victim, and overwhelmed the presumption of innocence. The prosecution presented an expert witness, Thomas Cottrell, who had never met Theodore Jensen (the complainant) or Mr. Tomasik, but who nonetheless testified at great length, and in detail, how the complainant’s actions comported with those of a victim of sexual abuse, and how Appellant's alleged conduct was entirely consistent with that of a sexual abuser. The admission of child sexual abuse accommodation syndrome (CSAAS) and offender dynamic testimony in this case violated the standards set forth in *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012), *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), and MRE 702, and rose to the level of plain error as it was outcome determinative - the expert’s testimony improperly vouched for the complainant, and surely led the jury to the conclusion that Mr. Tomasik was guilty of sexually abusing the complainant.

Criminal defendants possess a due process right to a fair trial, which may be denied by improper evidentiary rulings. See US Const, Ams V, XIV. See also *Walker v Engle, supra*.

State court evidentiary violations may rise to the level of a federal constitutional deprivation by rendering a trial fundamentally unfair. *Estelle v McGuire*, *supra*; *Crane v Kentucky*, *supra*.

In *Maryland v Craig*, 497 US 836, 868; 110 S Ct 3157; 111 L Ed2d 666 (1990), the United States Supreme Court cautioned that courts should be particularly insistent in protecting innocent defendants in child sexual abuse cases. These cases have special considerations that do not exist in other syndrome-type cases, including concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury. See *People v Beckley*, 434 Mich 691, 721-722; 456 NW2d 391 (1990).

Because factfinders may not be fully versed in psychological theories dealing with sexual assault victims and their behavior, Appellant understands that sometimes juries will require assistance from experts in cases dealing with abuse, but before these “experts” are allowed to testify it must be demonstrated that the jurors truly need assistance on the matter, that the witness is qualified to assist them, and that the theories and methodologies employed by the witness are **valid and reliable**. And even if all of these criteria are met, the evidence must be more probative than prejudicial to be admitted. Without these protections, the danger is great that the expert testimony will not provide relevant information for the jury, but instead vouch for the credibility the complainant. None of these factors were met in this case. Where the “assistance” from the expert amounts to little more than telling the jurors which witness to believe, the expert has intruded into the very area where the lay jury reigns supreme. This is precisely what occurred in this case, and this Court should reverse Appellant’s conviction.

## **B. Analysis**

The admissibility of expert testimony is governed by MRE 702, which states:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may

testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

These considerations are separate and distinct and **each** must be satisfied independently in order to “assist the trier of fact to understand the evidence or to determine a fact in issue.”

*Kowalski, supra* at 120-121. “A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a **fundamental duty** to ensure that the proffered expert testimony is both relevant and reliable.” *Id.* (emphasis added); see also, *Daubert v Merrell*, 509 US 579, 594–595; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Kumho Tire Co. v Carmichael*, 526 US 137, 149–151, 119 S Ct 1167; 125 L.Ed 2d 469 (1993). The revised MRE 702 and *Kowalski* represent a revolution in Michigan expert evidence law in that they provide rigorous guidelines for ascertaining whether testimony claimed to be scientific is, in fact, scientific. The trial court in this case failed in its fundamental role as a gatekeeper, and failed to follow the proper guidelines for admitting expert testimony.

Because there are many different kinds of experts and expertise, this inquiry is, by necessity, a flexible one, and a court determining the admissibility of expert testimony may consider reliability factors pertinent to the particular type of expert testimony offered and its connection to the particular facts of the case. *Daubert, supra* at 594-595. In this case, the particular types of expert testimony were CSAAS and offender dynamics.

**1. The expert testimony did nothing to assist the trier of fact to understand the evidence or to determine a fact in issue**

The threshold inquiry into whether expert testimony is proper under MRE 702 is whether the proposed testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In *Kowalski*, this Court, by way of an example, surmised that the behavior of sexually abused children sometimes will present a situation where courts will find it useful to

allow “experts to explain other human behavior that is contrary to the average person's commonsense assumptions.” *Kowalski, supra* at 123. In *Peterson, supra* at 352-353, this Court held that “an expert may testify in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim,”<sup>17</sup> and “an expert may testify with regard to the consistencies between the behavior<sup>18</sup> of the particular victim and other victims of child abuse to rebut an attack on the victim’s credibility.”

Appellant agrees with the *Peterson* Court that there may very well be situations where the psychological issues presented in a child sexual abuse case are so perplexing that an expert is required to assist the jury to understand a particular human behavior, but courts have consistently ignored their gatekeeping function and have admitted expert testimony on CSAAS in situations which do not warrant its introduction.<sup>19</sup> Testimony from syndrome “experts” has been used to discuss such common symptoms of sexual abuse victims as poor self-esteem, family problems,

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<sup>17</sup> Only three other states (New York, Kansas, and New Hampshire) permit evidence of CSAAS not just to rebut an attack on the victim's credibility, but to preempt such an attack before it even occurs. *People v Herington*, 11 AD3d 931; 782 NYS2d 214 (2004); *State v McIntosh*, 58 P3d 716, 729 (Kan, 2002); *State v Cressey*, 628 A2d 696, 703 (NH, 1993).

<sup>18</sup> The *Kowalski* Court presented only two examples of CSAAS behavior - delayed reporting of abuse and retraction of accusations. *Id.*

<sup>19</sup> Trial courts are routinely and improperly admitting CSAAS testimony because trial judges are not properly performing their gatekeeping function as prescribed by *Daubert/Kowalski/MRE* 702. Judges may be incorrectly applying the factors because they may not fully understand those factors. In a 2001 study that interviewed 400 state court judges regarding their attitudes toward the *Daubert* criteria and the gatekeeping role of the judge, 91% of judges stated that the *Daubert* guidelines were useful criteria and that gatekeeping was an appropriate function for the judiciary. The study further examined how well the judges were able to apply the *Daubert* guidelines. It found that while over 90% seemed to understand the peer review/publication and general acceptance criteria, only 6% of judges gave answers that indicated a clear understanding of falsifiability, and only 4% indicated a clear understanding of error rates. Gatowski, et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L & Hum Behav 433, 443 (2001) .

association with an older peer group, depression, drug abuse, withdrawal, leaving home without permission, and problems with school behavior and performance as indicative of sexual abuse. See, e.g., *Steward v State*, 652 NE2d 490, 492 (Ind, 1995); *Commonwealth v Dunkle*, 602 A2d 830, 833 (Pa, 1992). It is insulting to juries to assume that they would need expert testimony to understand that sexual abuse victims sometimes exhibit destructive behavior.

To introduce into the jury process “expert” witnesses who will testify that victims of sexual assault may have behavior issues is, as the *Kowalski* Court reflected regarding false confession expert testimony, “to belabor the obvious and create the illusion that there is some ‘scientific, technical, or other specialized knowledge’ that will assist the jury in carrying out its core responsibility of determining credibility. Thus, the introduction of ‘experts’ into the realm of the mundane does not merely risk *distracting* the jury, but risks the prospect of jurors increasingly *subordinating* their own commonsense judgments - precisely the kind of judgments that form the rationale for the jury system in the first place - to the false *appearance* of expertise suggested by the presence of expert psychological testimony.” *Kowalski, supra* at 147-148.

*Peterson* was decided twenty years ago, and much has changed concerning our understanding of the behavior of children who have been abused, and of CSAAS. There is much more public awareness regarding delayed disclosure and other “counter-intuitive” behaviors of victims of sexual abuse.<sup>20</sup> This is no longer a subject which requires scientific, technical, or other specialized knowledge for the average person to understand **in all situations**. Indeed, it was not needed in this case. Appellant never questioned that kids sometimes delay disclosure, yet Mr. Cottrell was brought in by the prosecution to assure the jury that a delay in disclosing

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<sup>20</sup> The “line between common experience and knowledge and matters known only to experts varies with time and circumstances. At any one time, the transition from one type of knowledge to the other is often gradual and cannot be defined precisely.” *Commonwealth v Francis*, 453 NE2d 1204, 1209 (Mass, 1983)(Justice Herbert Wilkins).

sexual abuse is “very common” (T IV 8; App p. 286a). Cottrell testified that “[d]elay in disclosure on a simply generic level is not at all inconsistent with child sexual abuse. It’s actually a relatively normative patter that we see in children” (*Id.*). This is not testimony that a jury needed to be able to understand any fact at issue in this case. Courts have held that there is no need to have an expert explain why a child might not promptly report abuse, since it is within the common understanding of the jury. *Dunkle, supra* at 837-38; *State v Kim*, 645 P2d 1330, 1337 (Haw, 1982).

Mr. Cottrell also explained for the jury that, when Theo attempted suicide and abused drugs, it was “consistent with” someone who was sexually abused (T IV 11-12; App pp. 289a-290a). Again, this type of behavior is not so complex that a jury would not be able to understand it, and it is their function to make determinations on the credibility and weight of the testimony. This testimony only served to vouch for the complainant, which severely prejudiced Mr. Tomasik in a case which boiled down to a one-on-one credibility contest. This problem was compounded when Cottrell then told the jury that Appellant’s actions where consistent with that of a person who is a sexual abuser (*Id.* at 12-15; App pp. 290a-293a).

The proliferation of CSAAS testimony is akin to the evolution that took place in expert testimony regarding eyewitness identification. Courts' treatment of eyewitness identification testimony has experienced a dramatic transformation in the past twenty years. Beginning in the early 1970's, defense attorneys were freely allowed to bring expert testimony into the courtroom regarding a myriad of issues dealing with eyewitness testimony. *United States v Smithers*, 212 F3d 306, 311 (CA 6, 2000). Then, as new science emerged, and this subject became more commonly understood by the public, courts became increasingly skeptical about admitting such testimony, elaborating a host of reasons why eyewitness experts should not be allowed to testify. *Id.*, see also *United States v Amaral*, 488 F2d 1148 (CA 9, 1973) (reasoning that identification

was adequately addressed through cross-examination); *United States v Purham*, 725 F2d 450, 454 (CA 8, 1984) (finding the question is within the expertise of jurors); *United States v Sims*, 617 F2d 1371, 1375 (CA 9, 1980) (finding no general acceptance in scientific community); *United States v Fosher*, 590 F2d 381, 383 (CA 1, 1979) (ruling that the testimony would be prejudicial). Courts rightfully scaled back the use of experts in this field. Indeed this Court, albeit in dicta, recognized this trend and noted in *Kowalski* that “questions of eyewitness identification ... involve obvious human behavior from which jurors can make ‘commonsense credibility determinations.’” *Kowalski, supra* at 143 (citation omitted).

This type of correction is now needed regarding expert testimony dealing with behavior of alleged victims of sexual abuse, and more specifically, CSAAS. Much of this testimony no longer requires expert analysis to be understood by the average juror.

“The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the **issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the ‘technical’ details.** The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.” *Beckley, supra* at 721 (emphasis added).

## **2. The theories and methodologies employed by Cottrell were neither valid nor reliable**

Even if a court identifies that testimony does involve a matter beyond the common understanding of the average juror, the proffered testimony still cannot be admitted if it is not the product of reliable principles and methods. *Kowalski, supra* at 121. “Expert testimony without a credible foundation of scientific data, principles, and methodologies is unreliable and, thus,

unhelpful to the trier of fact.” *Id.* When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore, Evidence § 1918.

“When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known. This analysis requires courts to ensure that ‘each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable.’” *Kowalski, supra* at 131.

Evidence of syndromes in court proceedings has been a major source of confusion for courts, especially in sexual assault cases and CSAAS testimony. Descriptions of syndromal types lack validity unless coupled with clinical examinations. Diagnoses of informal syndromes in victims run the risk of misleading juries. Indeed, CSAAS, like all psychodynamic theories, “is essentially irrefutable” because it is impossible to prove that a child is not suffering from CSAAS. *State v Foret*, 628 So 2d 1116, 1125 (La, 1993). The fact that CSAAS is basically unfalsifiable should weigh heavily in any analysis of its reliability. *Id.*

The jury in this case heard an “expert” declare that Theo’s behavior was “consistent with” that of a child who was sexually abused, and that he “had all of the marks of being a child who was sexually abused,” and that Appellant’s behavior was consistent with that of a sexual abuser (App pp. 245a-263a). This was improper. The evidence was inadmissible under MRE 702 and *Kowalski* because it does not hold up under the scientific microscope. See Kendall-Tackett, Williams, & Finkelhor, *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*. Psychological Bulletin, 113, 164-180 (1993). First, the idea that there is a list of behaviors that can be used to diagnose child sexual abuse has been shown to have no scientific underpinning. (*Id.*). In fact, the lists of “symptoms” experts have associated with

sexual abuse include an array of behaviors displayed by both maladjusted and adjusted children alike (*Id.*).

Relying on numerous treatises on the subject of child sexual abuse, the Pennsylvania Supreme Court reasoned that the behavior patterns frequently associated with CSAAS are not necessarily unique to sexually abused children, but are also common to children who have experienced other trauma. *Dunkle, supra* at 832. The court also noted that “abused children react in a myriad of ways that may not only be dissimilar from other sexually abused children, but may be the very same behaviors as children exhibit who are **not abused**. *Id.* The court then determined that “the testimony about the uniformity of behaviors exhibited by sexually abused children is not ‘sufficiently established to have gained general acceptance in the particular field in which it belongs.’” *Id.* at 834, citing *Pennsylvania v Nazarovitch*, 436 A2d 170, 172 (Pa, 1981). Thus, the court held that “[p]ermitting an expert to testify about an unsupportable behavioral profile and then introducing testimony to show that the witness acted in conformance with such a profile is an erroneous method of obtaining a conviction.” *Dunkle, supra* at 830.

The claim is not that Theo did not exhibit any behavior issues. Appellant asserts that Theo’s problems cited in this case (anxiety, suicidal thoughts, fears, and even improper sexual behaviors) are common in children of Theo’s age at the time, or else they can be associated with other types of childhood behavioral disorders (e.g., see Kendall-Tackett, *supra*). In addition, there is testimony on this record that the death of Theo’s grandfather was a traumatic event in Theo’s life which occurred at the same time he claims the abuse started, and which easily could have elicited these symptoms (T III 36; App pp. 160a, 720a). Although Theo may have displayed a variety of issues, contrary to the testimony of the states’ experts, these were simply not diagnostic of sexual abuse.

Even the originator of CSAAS has recognized that courts began using his theories to admit evidence he never intended, and has since described CSAAS as “clinical observation” which has become “elevated as gospel.” See *Steward, supra* at 492-93 (citations omitted). “The syndrome was not intended as a diagnostic device and does not detect sexual abuse. Rather, the syndrome was designed for purposes of treating child victims and offering them ... assistance ...” *Id.* (citations omitted); see also Askowitz & Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L Rev 2027, 2039-40 (1994).

Michigan Supreme Court Justice Michal F. Cavanagh wrote a forward thinking dissenting opinion in *Peterson* proclaiming that, when it comes to CSAAS evidence, courts have it backwards:

The [child sexual abuse accommodation] syndrome's sole function was to start with a known child victim of sexual abuse, and then to explain the child's behavioral reactions to the abuse. The syndrome cannot be used in reverse, which would be to start with the behavioral reactions identified by the syndrome, check off the ones that the child exhibits, and conclude that, on the basis of the checklist, the child was sexually abused. [*Peterson, supra* at 873 (Cavanagh, J., dissenting)]

Mental health professionals are trained to assist patients, not judge their credibility. “While it may be entirely proper for a clinician to accept a patient report of sex abuse at face value and proceed to render treatment on that basis, for forensic purposes, such an assumption is utterly inappropriate.” *Newkirk v Commonwealth*, 937 SW2d 690, 694 (Ky, 1996). Cottrell’s testimony that the majority of Theo’s behavior was consistent with a kid who was sexually abused, and Appellant’s behavior was consistent with someone who did it, improperly amounted to Cottrell simply acting as judge and jury in this credibility contest.

Thomas Cottrell based his testimony completely on his experience working with people who were self-reported victims of sexual assault (T IV 4-16; App pp. 282a- 294a). Cottrell worked at the YWCA for almost 25 years in various positions, each involving interacting with

those who claimed to be sexually abused (*Id.* at 4; App p. 282a). He estimated he had helped 500 families who were dealing with sexual assault (*Id.* at 5; App p. 283a).

Courts have to be particularly cautious in cases of child sexual abuse when the expert is someone like Mr. Cottrell whose role is to treat sexually abused children, instead of someone whose expertise is differentiating between abused and non-abused children. See, e.g., Gilstrap & McHenry, *Using Experts to Aid Jurors in Assessing Child Witness Credibility*, Colo Lawyer, 65 (Aug 2006). Such experts may not be sufficiently qualified, even by experience, to testify about CSAAS, yet courts very rarely exclude CSAAS testimony based on an expert's lack of qualifications. See *State v Spigarolo*, 556 A2d 112, 121-22 (Conn, 1989) (court allowed a social worker with less than two years as a clinical social worker testify as an expert); *Hernandez v State*, 53 SW3d 742, 750 (Tex App, 2001) (the court qualified as an expert someone who only held a bachelor's degree in criminal justice and sociology, based on the “depth of her professional career,” which included three years as the Executive Director of the Advocacy Center for Children, a non-profit organization that works with governmental agencies to evaluate child abuse cases, eighteen years as a caseworker and supervisor at Children's Protective Services, and her personal experience in conducting and supervising investigations); but see *Dunkle, supra* at 831 (noting that the validity of expert testimony may be affected when the expert testifying is neither a psychologist nor a psychiatrist). Mr. Cottrell is neither a psychologist nor a psychiatrist.

One of the main issues with the type of CSAAS expert testimony which was presented in this case is that the underlying support for the “evidence” is derived not from experimentation but simply from observation. There arises a serious question as to whether this behavioral evidence can meet the standard of reliable science required to be admitted under MRE 702.

Nonetheless, this evidence continues to be admitted routinely at trials, often with little critical analysis by the trial courts.

Mr. Cottrell's anecdotal testimony about children he has observed cannot be considered to be based in science.<sup>21</sup> The testimony could not be tested or peer-reviewed. There would be no way to determine the error rate of Cottrell's observations, or how many of the sexual assault victims Cottrell helped treat were actually abused<sup>22</sup>. No data was presented to supplement Mr. Cottrell's theories. Instead, his testimony was rooted solely in his opinions based on what he claimed he witnessed working with victims of sexual assault.

Expert testimony based upon observation should absolutely be subject to judicial scrutiny.

There is no logical reason why conclusions based on personal observations or clinical experience should not be subject to [reliability] analysis. **That a person qualifies as an expert does not endow his testimony with magic qualities.** Observation informed by experience is but one scientific technique that is no less susceptible to [reliability] analysis than other types of scientific methodology. The gatekeeping function . . . is the same regardless of the nature of the methodology used: to determine whether the process or theory underlying a scientific expert's opinion lacks reliability [such] that [the] opinion should not reach the trier of fact. [*Canavan's Case*, 733 NE2d 1042, 1050 (Mass, 2000) quoting *Boston Gas Co v Assessors of Boston*, 137 N.E.2d 462 (Mass, 1956)(emphasis added)]

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<sup>21</sup> In its recent opinion the Court of Appeals stated that Appellant "points to no evidence that would call into question Cottrell's expertise in the field of behavior of victims of child sexual abuse, or whether Cottrell's testimony was based on sufficient facts and data and was the product of reliable principles and methods." (App p. 127a). However, it is the proponent of the evidence in question that bears the burden of showing why the evidence comes in under MRE 702.

<sup>22</sup> Louisiana, on one isolated occasion, is the only state Appellant has found which performed its own evaluation of the known or potential rate of error of CSAAS diagnosis, and it found that the error rate was too high for the testimony to be admissible. *Foret, supra* at 1125-27.

While courts have emphasized the need to be flexible regarding application of the reliability factors to testimony based on experience and observation, there still must be some showing of validation beyond the witness's own assurance.

Again, there will indeed be cases where the facts and issues will clearly require expert testimony on CSAAS. This is just not one of them. Dr. Cottrell merely testified that virtually all of the complainant's behaviors in this case were "consistent with" those of a child who was sexually abused (T IV 7-16; App pp. 285a-294a). Syndrome evidence without empirical foundations describe patterns of behavior applicable to some, but certainly not all, or usually even most, victims of abuse. Further, the testimony did not assist the jury because the behaviors Cottrell described could also have been "consistent with" any number of other issues, such as attachment disorder, ADHD/ADD, autism, conduct disorder, oppositional defiant disorder, and/or separation anxiety disorder.

In *Kowalski*, Dr. Richard Leo, a social psychologist, proposed to testify that false confessions existed, that certain psychological interrogation techniques commonly employed by the police sometimes resulted in false confessions, and that some of those techniques were used in that case. *Id.* at 132. "With regard to Leo, the circuit court followed the mandate of MRE 702 and carefully reviewed all the stages of Leo's research, starting with his data. The circuit court noted that Leo decided whether a confession was false on the basis of information he gathered from sources." *Id.* The circuit court also "questioned the accuracy and potential bias of these sources." *Id.* This type of analysis was not done by the trial court in this case.

The *Kowalski* Court identified multiple problems with the analysis Leo applied to his data. *Id.* at 133. "The circuit court concluded that, rather than yielding factors common to all false confessions, Leo's method seemed to yield only factors common to confessions Leo believed to be false. This also made it impossible to test Leo's research or compute its rate of

error. The circuit court also noted that because Leo did not have a ‘reliable means to have a study group’ that excluded extraneous factors, he had ‘no ability to estimate the frequency of false confessions.’” *Id.* at 132-133.

This is precisely the issue with Cottrell’s testimony. It was all observational in nature, and not testable data. Indeed, he never even was asked to present any data. Experience is not enough to declare expert testimony generally reliable. *Kowalski, supra*. The prosecutor was able to get Cottrell to provide “expert” testimony to the jury that it was “particularly consistent” for a sexually abused boy to then act out sexually on another child<sup>23</sup> (T IV 11; App p. 289a). That it was normal for victims of sexual abuse to keep visiting the house of the abuser (*Id.* at 13; App p. 291a). That victims of sexual abuse will often have issues with drugs and are more likely to attempt suicide<sup>24</sup> (*Id.* at 11-13; App pp. 289a-291a). Not content to limit the expert testimony of Thomas Cottrell to the similarities between the actions of Theo and those of a sexual-abuse victim, the prosecutor then instructed Mr. Cottrell: “Let’s talk about offender dynamics” (T IV 15; App p. 293a). In response, Mr. Cottrell furnished expansive answers that explained in detail why a sexual abuser would act precisely as Mr. Tomasik allegedly acted in targeting Theo for sexual abuse (*Id.* at 15-27; App pp. 293a-305a).

For example, Cottrell told the jury that it was typical for abusers to assault children in their own home (*Id.* at 15; App p. 293a). Appellant’s family testified it was a loving home, and that

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<sup>23</sup> There was testimony that Theo had improper sexual contact with a cousin.

<sup>24</sup> The Pennsylvania Supreme Court held that evidence of behavior problems were not probative in a sexual abuse case. “Clearly, drug and alcohol abuse, eating disorders, low self-esteem and not doing school work are common phenomena not solely related to child abuse. To permit the jury to speculate that they might be, however, violates every notion of what constitutes probative and relevant evidence. It is neither scientifically supportable nor legally supportable. Such a laundry list of possible behaviors does no more than invite speculation and will not be condoned.” *Dunkle, supra* at 834-835.

Appellant never abused them, nor had they witnessed Appellant abusing anyone else. Mr.

Cottrell then told the jury that it was typical that sexual abusers are supported by their families:

And, again, this - in some ways - the grooming<sup>25</sup> process does not extend just to the child, it extends to all people around that assailant as well, because, again, they don't want to be caught, they don't want people to have questions about them, they don't want their acts of assault to be seen or anticipated by anyone around them, so they are acting in very specific ways to make sure they've ingratiated themselves to the folks around them (*Id.* at 26-27; App p. 304a).

All of this testimony was admitted without any ability to determine its reliability or analysis of any error rate<sup>26</sup>. It was merely stated by Mr. Cottrell as truth, and presented to the jury as “expert testimony.” Cottrell even testified that the fact that Theo claimed that he would immediately go outside and ride his bike after being anally raped was “consistent with” a child who was the victim of sexual abuse (T IV 13; App p. 291a). This is a ridiculous claim, and the jury should never have heard it. This testimony did nothing to logically advance a material aspect of this case, and it severely prejudiced Mr. Tomasik by improperly vouching for the complainant in this credibility contest.

The prosecution in this case advanced no evidence at trial that the facts underlying Cottrell’s testimony were of a type reasonably relied on by experts in CSAAS, or that it is possible to make a statement that sexually abused children will exhibit the same characteristics or traits that Theo did. Indeed, the state failed to lay the proper foundation regarding the admissibility of CSAAS. The trial court failed in its’ fundamental duty as a gatekeeper. Mr.

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<sup>25</sup> Contrary to Mr. Cottrell’s testimony, there was no grooming in this case (MT 12/18/08 48; App p. 68a). Grooming typically involves gaining the trust of the selected victim (*Id.*). This can be achieved by developing a friendship with the potential victim (*Id.*). However, the evidence in this case showed no signs of grooming. The initiation of the alleged criminal sexual relationship just happened one day (T III 35-37; App pp.159a-161a).

<sup>26</sup> See Footnote 22.

Cottrell's testimony invaded the jury's province by offering testimony which ultimately went to credibility. Credibility of witnesses is a matter only for the jury.

Appellant does not suggest that expert testimony dealing with CSAAS or offender dynamics is irrelevant in every situation or case, or that such testimony should be barred by rule. However, its scope and implications have to be better vetted by trial courts in order to make sure that the evidence coming in is relevant, reliable and more probative than prejudicial. The CSAAS testimony was not relevant or reliable in this case.

### **3. Other jurisdictions**

Many jurisdictions have indeed scaled back, or held inadmissible, evidence of CSAAS because of its lack of scientific acceptance. In Kentucky, courts have noted that “[i]n an unbroken line of decisions ... this Court has repeatedly expressed its distrust of expert testimony which purported to determine criminal conduct based on a perceived psychological syndrome.” *Newkirk, supra* at 690-691; see also *Blount v Kentucky*, 392 SW3D 393, 395 (Ky, 2013). The multiple rationales for the specific rule against CSAAS testimony include “the lack of diagnostic reliability, the lack of general acceptance within the discipline from which such testimony emanates, and the overwhelmingly persuasive nature of such testimony effectively dominating the decision-making process, uniquely the function of the jury.” *Newkirk, supra* at 691. See also, *Hellstrom v Commonwealth*, 825 SW2d 612 (Ky, 1992); *Miller v Commonwealth*, 77 SW3d 566 (Ky, 2002); *Kurtz v Commonwealth*, 172 SW3d 409 (Ky, 2005); and *Sanderson v Commonwealth*, 291 SW3d 610 (Ky, 2009).

Most recently, in *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky, 2009), we held that it was improper for child sexual abuse witness Lori Brown, the same clinical psychology expert involved in this case, to testify that it is normal for child victims of sexual abuse to add details about their abuse and, under certain circumstances, to appear happy in their outward life and be able to excel in their extracurricular activities and make good grades. The Commonwealth further asked whether what Brown described as a child's attempt to

disconnect from such abuse is the reason sexually-abused girls become prostitutes. In reversing the sexual offense conviction in *Sanderson* we concluded, “Brown's ‘expert’ testimony in this case, coupled with the Commonwealth's speculation about the creation of prostitutes, are the exact type of generic and unreliable evidence this Court has repeatedly held to be reversible error.” [*Blount, supra.*]

Kentucky courts do not allow experts to testify that evidence of a child's behavioral symptoms or traits is indicative of sexual abuse on grounds that this is not a generally accepted medical concept. *Bell v Kentucky*, 245 SW3d 738, 744-45 (Ky, 2008). See also *Brown v Kentucky*, 812 SW2d 502, 503-04 (Ky, 1991) (social worker's testimony that child's behavior “consistent with abuse” was reversible error).

Tennessee is another jurisdiction where expert testimony dealing with CSAAS is not admissible because it lacks scientific acceptance. *Tennessee v Ballard*, 855 SW2D 557, 561-63 (Tenn, 1993); See also *Tennessee v Dickerson*, 789 SW2d 566 (Tenn Ct Crim App, 1990); *Tennessee v Schimpf*, 782 SW2d 186 (Tenn Ct Crim App, 1989); *Tennessee v Myers*, 764 SW2d 214, 217 (Tenn Ct Crim App, 1988).

Courts have held that this “special aura” of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as fact finder and adopt the judgment of the expert. See *Bussey v Kentucky*, 697 SW2d 139, 141 (Ky, 1985); *Washington v Maule*, 667 P2d 96 (Wash Ct App, 1983). Such evidence carries strong potential to prejudice a defendant's cause by encouraging a jury to conclude that because the children have been identified by an expert to exhibit behavior consistent with post-traumatic stress syndrome, brought on by sexual abuse, then it is more likely that the defendant committed the crime. *Bussey, supra* at 141.

Testimony that children exhibit certain symptoms or characteristics should not suffice to confirm the fact of sexual abuse. *Schimpf, supra* at 193. The symptoms of the syndrome are “not like a fingerprint in that it can clearly identify the perpetrator of a crime.” *Mitchell v*

*Kentucky*, 777 SW2d 930, 932 (Ky, 1989). Expert testimony of this type invades the province of the jury to decide on the credibility of witnesses. *Ballard, supra* at 561-563. Further, no consensus exists on the reliability of a psychological profile to determine abuse. *Id.* Therefore, expert testimony describing the behavior of an allegedly sexually abused child is not reliable enough to “substantially assist” a jury in an inquiry of whether the crime of child sexual abuse has taken place. *Id.*

Pennsylvania courts have also restricted the use of CSAAS testimony. In *Pennsylvania v Emge*, 553 A2d 74, 76 (Pa Super Ct, 1988), the court held that “testimony which matches up the behavior of known victims of child sexual abuse with that of an alleged victim can serve no purpose other than to bolster the credibility of the alleged victim, and this purpose is patently prohibited.” See also, *Commonwealth v Rounds*, 542 A2d 997 (Pa, 1988); *Commonwealth v Davis*, 541 A2d 315 (Pa, 1988); *Commonwealth v Seese*, 517 A2d 920 (Pa, 1986).

In Massachusetts, an expert witness on sexually abused children may not directly refer or compare the behavior of the complainant to general behavioral characteristics of sexually abused children as it would be overwhelmingly prejudicial towards a defendant. *Massachusetts v Quinn*, 15 NE3d 726, 731 (Mass, 2014). An expert may not opine that the child's behavior or experience is consistent with the typical behavior or experience of sexually abused children. *Commonwealth v Richardson*, 667 NE2d 257, 262 (Mass, 1996); see also *Commonwealth v Brouillard*, 665 NE2d 113, 115-116 (Mass App Ct, 1996). Further, expert testimony that describes what a typical victim looks or acts like, and that suggests that child victims in a particular case have acted typically when compared to a “norm” of child victims, may not be admitted. *Massachusetts v DeLioney*, 794 NE2D 613, 621-623 (Mass App Ct, 2014).

#### 4. MRE 403 and plain error analysis

Even if expert testimony regarding CSAAS meets the strict requirements for reliability and relevancy, a trial judge must further consider how the testimony will fare under MRE 403. *Kowalski, supra* at 120-122. MRE 403 establishes a balancing test for the admissibility of all evidence; it excludes relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....” Evidence is unfairly prejudicial when “there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra*.

The United States Supreme Court has warned that “expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 ... exercises more control over experts than over lay witnesses.” *Daubert, supra* at 595. The concern of unfair prejudice to defendants is particularly critical in child sexual abuse cases, because CSAAS evidence “can be highly prejudicial if not properly handled by the trial court ... [since] the particular aspects of CSAAS are as consistent with false testimony as with true testimony.” *People v Patino*, 26 Cal App 4th 1737; 32 Cal Rptr 2d 345, 349 (1994). A child who exhibits the behaviors of CSAAS might have been sexually abused, but it is also quite possible that the child might simply be lying. Furthermore, “[e]ven assuming that CSAAS could definitively indicate that a child was abused, it still says nothing about when the child was abused or by whom” Flint, *Child Sexual Abuse Accommodation Syndrome: Admissibility Requirements*. Am J Crim L 23:171, 177 (1995). There is no doubt that Cottrell’s testimony dealing with CSAAS and offender dynamics was considerably more prejudicial than probative. As discussed above, Cottrell’s testimony had virtually no probative value in this case. However, there is a saying that evidence of “low probative worth can often be concealed in the jargon of some expert.” See Wright & Graham, 22

Fed Practice and Procedure § 5217, at 86-90 (1978); see also *White v Estelle*, 554 F Supp 851 (SD Tex, 1982). This saying is particularly fitting for this case.

Mr. Cottrell claimed that Theo's behaviors were all consistent with being sexually abused, and Appellant's actions were representative of a sexual predator. Indeed, the prosecutor asked Cottrell why a child who had been subjected to painful anal intercourse would go "outside and rid[e] his bike with his friend" (T IV 13; App p. 291a). In response to this question Mr. Cottrell somehow concluded that this behavior was consistent with a victim of sexual assault (*Id.*). There was no probative value to this evidence, yet it was devastatingly prejudicial, especially when combined with later testimony that Appellant's behavior was consistent with a person committing sexual abuse. Expert witnesses hold great potential to sway a factfinder, especially in a case which is reduced to a credibility contest between the complainant and the defendant as this one was. "To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat." *Beckley, supra* at 721-722.

Where a jury is confronted with evidence of an alleged child victim's behaviors, paired with expert testimony concerning similar CSAAS behaviors, the invited inference is obviously that the child was sexually abused because he fits the profile. This evidence is profoundly misleading, and is just as prejudicial as if the expert had stated outright that it was his conclusion that the complainant was abused by the defendant.

Justice Michael F. Cavanagh understood the potential for unfair prejudice that expert testimony dealing with CSAAS presents:

The marginal probative value of allowing the [behavioral] expert to further testify with respect to the particular complainant is substantially outweighed by the danger of unfair prejudice that the jury will misuse the testimony. It invades the province of the jury to assess credibility. It invites the jury to give undue weight to testimony that is foundationally and fundamentally unreliable merely

because it is cloaked with the expertise of an expert. It also invites the jury to believe that the expert knows more than he is telling, by letting the jurors infer that the expert, who works with sexually abused children every day, must believe this child's story or else the expert would not be testifying. [*Peterson, supra* at 875-876 (Cavanagh, J., dissenting)]

In Appellant's case, the charges rested entirely upon the testimony of Theo. The importance of Thomas Cottrell's expert testimony in bolstering Theo's story is evident from the centrality of that expert testimony in the prosecutor's closing argument. Time and time again, the prosecutor relied upon Thomas Cottrell's expert opinions to explain to the jury why Theo was a victim of sexual abuse and that Appellant was his abuser (T V 147, 150, 153; App pp. 306a, 309a, 312a). Indeed, the prosecutor relied solely upon Thomas Cottrell in asserting Theo's "behavioral changes" were "absolutely consistent with a child of sexual abuse" (T V 150; App p. 3090a). Later in her closing, the prosecutor told the jury that Theo sexually acted "out on a child that is about the same age as he was when he's first molested. Again, very typical of a child who's been a victim of sexual abuse" (*Id.*).

The prosecutor even went as far as stating that Cottrell's testimony regarding Theo's behavior changes somehow showed that Appellant abused him. "His attempts at suicide, his drug abuse. Again, **Tom Cottrell said all of that fits and it points to the defendant**" (*Id.* at 153; App p. 312a)(emphasis added). She continued: "Again, the behavioral changes. The anger, the acting out, and then the complete change in his personality... it all fits" (*Id.*).

The prosecutor then turned her attention towards testimony Cottrell provided on offender dynamics. "Tom Cottrell told you that he works with perpetrators. He tells us it's very consistent for the perpetrator to choose one child, one vulnerable child. You don't have to have to have more than one victim. This is very consistent with a child – a person who molests a child" (*Id.*). There can be no doubt that Cottrell's testimony prejudiced Appellant, and it was plain error for the trial court to admit it.

The concern of unfair prejudice to defendants in cases where an expert presents CSAAS testimony is further compounded because studies have shown that cross-examination, one of the only methods to discredit unreliable scientific evidence, is not a particularly effective means of discrediting expert testimony once jurors have heard the testimony and made their decision on its validity. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal L Rev 1585, 1602 (2005); see also K M. B. Kovera et al., *Juror Evaluations of Expert Evidence Validity* (August 1997) (unpublished paper presented at the 105th Annual Convention of the American Psychological Association). Also, attempts to minimize the effect of an expert's testimony on CSAAS by calling an expert of their own may be futile to offset any aura of expertise the prosecution might have created. Kathy L. Hensley, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts*, 17 Pac. L.J. 1361, 1376 (1986).

In general, these safeguards may not be sufficient to educate jurors on the factors that indicate scientific reliability. This makes the gatekeeping role of the trial court even more imperative. Courts have warned that the "admission of CSAAS evidence, without limitation, would run too high a risk of misleading the jury and therefore be more prejudicial than probative." *Frenzel v State*, 849 P2d 741, 749 (Wyo, 1993).

Furthermore, a general expert witness jury instruction like the one given in this case does not reduce the potential for prejudice (T V 185; App p. 345a). Indeed, even if a court carefully and specifically instructs a jury that the presence of CSAAS behaviors alone do not indicate the presence of abuse, it is still very often unfairly prejudicial. See, e.g., *State v Curry*, 931 P2d 1133, 1139 (Ariz, 1996); *Steward*, *supra* at 499. Courts often underestimate how easily a juror may impermissibly infer that abuse has occurred simply because the alleged victim exhibits one or more symptoms of CSAAS. See *State v J.Q.*, 617 A2d 1196, 1205 (NJ, 1993).

Appellant's defense attorney did not object to Cottrell's testimony at trial, so this Court reviews the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[T]hree requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* Error affects a defendant's substantial rights when it affects the outcome of the lower court proceedings. *Id.* There can be no doubt, based on the full analysis provided within this issue, that the improper introduction of Cottrell's testimony easily meets these three requirements.

In this case, the CSAAS testimony denied Mr. Tomasik a fair trial by vouching for the complainant and impinging on the jury's fact-finding function. The uncorroborated testimony of the alleged victim was impermissibly bolstered by Cottrell's testimony and improperly influenced the jury's assessment of whether the complainant was telling the truth. The "special aura of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children" likely led this jury to abandon its responsibility as a fact finder and adopt the judgment of the expert. *Ballard, supra*, at 561-62.

### **C. Conclusion**

Appellant understands the daunting challenge all parties have in sexual abuse trials, notably ones dealing with children. The heinous nature of these cases explain the temptation for prosecutors to offer, and courts to admit, evidence of dubious relevance, reliability and probative value. However, such concerns certainly cannot justify the admission of the CSAAS and offender dynamic testimony in this case, testimony which carried a misleading "scientific" cache that undercut Mr. Tomasik's presumption of innocence and resulted in a wrongful conviction.

This case involved a clear credibility contest between Theo and Mr. Tomasik. Appellant has presented compelling evidence that Theo had a motive to fabricate the charges here.

Moreover, there were serious inconsistencies in virtually all of Theo's statements concerning the number, timing, and details of the alleged assaults. Appellant has now, thanks to reports turned over by this Court, provided evidence that Theo is a habitual liar who does not understand the difference between fact and fiction.

The prosecutor tried to bolster Theo's credibility by presenting "expert" testimony that Theo had all the markers of an abused child and that Appellant fit the description of a sexual predator.<sup>27</sup> The trial court in this case failed in its fundamental role as a gatekeeper when it neglected to follow the proper guidelines for admitting expert testimony. The more that courts permit experts to improperly advise the jury based on probability, classifications, syndromes and traits, the more we remove from the jury its historic function of assessing credibility.

The testimony presented by Cottrell was wholly improper: It was not needed to assist the jury, Cottrell was not qualified to give it, and the theories and methodologies espoused by Cottrell during his testimony were neither valid nor reliable. The testimony was supremely more prejudicial than probative. As such, Cottrell's improper testimony, when combined with the weakness of the prosecution's proofs and the complete failure on trial counsel's part to present a defense in this case, compels a finding that Mr. Tomasik did not receive his due process right to a fair trial.

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<sup>27</sup> This was bolstered when the trial court allowed a video where the investigating detective is allowed to tell the jury that she was certain that Mr. Tomasik was guilty. See Issue I.

**III. APPELLANT TOMASIK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS (US CONST, AM V; CONST 1963, ART 1, § 17) WHERE THE KENT COUNTY CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED IMPEACHMENT EVIDENCE.**

**STANDARD OF REVIEW:** The trial court’s failure to provide discovery is reviewed for an abuse of discretion. *People v Stanaway, supra*.

**ISSUE PRESERVATION:** This issue was preserved through discovery requests by trial defense counsel (see detailed description below).

**A. Introduction**

In *Stanaway, supra*, this Court set up a procedure for conducting in camera review of confidential records in sex cases. This procedure will not be engaged for general discovery (fishing expedition), but can be ordered if the defense demonstrates a particular need. Appellant met this standard both before and after trial, but was consistently denied any information. Recent release, by order of this Court, of just a fraction of the available counseling records clearly indicate that it was reversible error for the trial court not to have provided Appellant with these documents before trial. There is more than a reasonable probability that the trial result would have been different had this new evidence been timely disclosed to Appellant.

Appellant had presented ample information that his requests to see counseling records were necessary. There were multiple indications suggesting that Theo was seen by several therapists over a period of years. The clinical records that were available note that Theo had been treated for Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and depression. The defense Motion to Disclose Complainant’s Counseling Records quoted Theo’s earlier testimony that he had been “in counseling for many years, since the age of 5.” This

motion also stated that Theo had testified that he “consulted with approximately eight (8) therapists since the age of 5.” This was not a fishing expedition by Appellant.

At trial, the trial court issued an order, in response to the above noted defense motion to disclose, requiring that “the Kent County Prosecutor’s Office shall produce any and all counseling records of Theodore Jensen, IV, at or near eleven (11) years of age, when said child was “sexually acting out.” This is a far cry from what the defense had asked to review. In this case the defense consistently and repeatedly established a particularized need for review of all the records in question.

It was not until March of 2011 that Appellant was given access to two critical counseling records after this Court conducted an *in camera* review of Theo’s records and promptly directed the trial court to turn over two critical documents Appellant had never seen, and remanded the case back to the trial court.

After reviewing these documents, it is clear that the trial court erred in not having released them to Mr. Tomasik before his trial, and also erred in not granting a new trial once the records were revealed.

## **B. Description of reports turned over by this Court**

### **1. March 26, 2003 report authored by Dr. Timothy Zwart, App. p. 720a<sup>28</sup>**

Dr. Zwart’s report indicates that Theo consistently engaged in deceitful behavior. Theo would lie to teachers so often that it was hard to distinguish when he was telling the truth and when he was lying. “He [Theo] has the teacher team rather baffled. **He will lie and it becomes difficult to know truth from fiction.**” (Emphasis added.)

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<sup>28</sup> For a full description of what was contained in the Zwart and Joseph-Enders reports, please refer to the Statement of Facts at pp. 14 – 17.

Furthermore, Theo seemed to relish in his deceitful behavior. He was “quick to blame the adult in charge when asked to take responsibility for his actions.” And Dr. Zwart noted that, when explaining his aberrant behavior, Theo’s “overall energy level and affect became much brighter and he almost appears to revel in this type of mischief.”

Dr. Zwart described many of the lies Theo had created and stated that “this all adds to the sense that he does not know truth from fiction himself.” Dr. Zwart also stated that Theo has difficulty with “impulse control and self regulation” as measured by the GDS Delay Task.

**2. March 1, 2003 form and questionnaire authored by Denise Joseph-Enders, App. p. 730a<sup>29</sup>**

Denise Joseph-Enders was Theo’s resource room teacher. In March of 2003 she filled out a CAP form evaluating Theo’s behavior. She described a young man who consistently lied. “Theo has been lying to parents and teachers for so long he distorts reality. His is offended that we don’t trust him, but he has repeatedly broken our collective trust.”

Also important to this case is that Theo was “quick to blame the adult in charge when asked to ‘own’ his actions.” Ms. Joseph-Enders indicated that Theo sought the attention of his peers, and usually sought it with negative behavior.

Other teachers also found Theo to be dishonest and deceitful. They wrote that Theo “lies very often, so no one knows truth from fiction. The problems have been prevalent since he was very young...”. They also found that “Theo seems to be attracted to situations that cause trouble for himself. He has been caught in the middle of telling lies so often that it’s difficult to know when he is telling the truth.” They wrote about specific lies Theo had told about having a parole officer and shooting at targets shaped like people.

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<sup>29</sup> Please see Footnote 28.

Even more disturbing, they found that “Theo’s sense of what is real does not match what the majority of us see as reality. He seems to really believe some of his untruthful statements.”

The trial court erred in failing to disclose these reports to Mr. Tomasik before his trial. The trial court further erred when it denied Appellant’s Motion for New Trial. The Michigan Court of Appeals compounded these errors when it affirmed Appellant’s convictions in two separate opinions – dated November 29, 2011 and April 22, 2014 (App, pp 108a; App, pp. 117a). These errors denied Mr. Tomasik a fair trial in violation of his due process rights.

### **C. Analysis**

The newly discovered impeachment evidence in this case required a new trial based on the test announced in *Pennsylvania v Ritchie*, 480 US 39; 107 S Ct 989; 94 L Ed 2d 40 (1987); See also *People v Grissom*, 492 Mich 296, 821 NW2d 50 (2012); *People v Fink*, 456 Mich 449, 574 NW2d 28 (1998). The threshold question on whether newly released evidence would require retrial are whether the documents are favorable to the defense and material to the case. If any of the documents are favorable to defendant and material to the case, a new trial should be granted. *Id.* A determination of materiality does not require that the defendant demonstrate “by a preponderance” that the disclosure of the evidence would have resulted in his acquittal. Rather, the defendant must merely show that there is a “reasonable probability” of a different result, “and the adjective is important.” *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

It is clear that the information in the recently released records is favorable to the defense and material to the case. The records would have directly attacked Theo’s credibility, clearly putting the whole case in such a different light so as to undermine confidence in the verdict. It was constitutional error that Mr. Tomasik was not provided these documents before trial, and, as such, “it cannot be considered harmless.” *Fink, supra* at 454.

This new evidence, when looked at cumulatively in the context of a verdict which was of questionable validity, compels a finding that Mr. Tomasik did not receive his due process right to a fair trial.

This Court most recently directed the Court of Appeals to consider the new evidence under the ruling in *Grissom, supra*. This was another case where a defendant was granted a new trial based solely on newly discovered impeachment evidence. The *Grissom* court held that, in order for a new trial to be granted, the defendant must show “that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the newly discovered evidence is not cumulative, (3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial.” *Grissom, supra* at 320. The facts of this case satisfy the *Grissom* test, and justice demands a new trial.

Appellant asked for this evidence at every stage of appeal, and was not even aware of the two critical reports at issue until this Court ordered that the trial court provide them to Mr. Tomasik. This satisfies the first prong of the *Grissom* test.

The second prong is also satisfied because the new evidence is not cumulative. This case was reduced to a credibility contest between Appellant and Theo. The evidence in the two reports would have directly attacked Theo’s credibility, clearly putting the whole case in a much different light. The Court of Appeals, in their most recent opinion, agreed that “[t]his case came down to a credibility contest between defendant and T.J.” (App. 130a). However the court simply repeated their reasoning from their prior opinion that “the reports at issue present additional evidence that T.J. was a **habitual** liar, but the jury received ample evidence to that effect and still chose to find T.J.’s allegations against defendant credible. We hold that the newly discovered evidence did not entitle defendant to a new trial.” *Id.* (emphasis added). However, the information heard at trial was wholly different in character than the information in the newly

released reports. Presenting evidence that a child lied in one instance when questioned about a specific wrongdoing is very different than presenting evidence that a child does not have even the capacity to know the difference between the truth and the fictions he has made up. This evidence was not presented at trial, and is not cumulative.

The jury did not hear that Theo was a chronic liar who did not have the ability to tell the difference between truth and fiction. Had the jury heard this powerful testimony there can be no doubt that the result would have been different. This information would have directly attacked Theo's credibility, clearly putting the whole case in such a different light so as to undermine confidence in the verdict.<sup>30</sup>

The third prong of the *Grissom* test is whether the defendant could have reasonably discovered and produced the evidence at trial. While Appellant's trial attorney did file a motion for discovery before trial, he failed to adequately assess the complainant's treatment history and, given the triggering facts suggesting a false allegation present here, failed to work up specific criteria and demand an in camera review by the trial court of all treatment, counseling, and educational records. This was clearly ineffective assistance of counsel (see Issue IV, *infra*). In this case trial counsel should have understood, and certainly should have uncovered, that the complainant, Theo Jensen, had been treated extensively by therapists due to his troubled past. Indeed, the record reflects that as many as eight other therapists besides Ms. Schaefer-Space treated this child for various disorders, including ADHD and ODD. The failure to seek out these records and request a *Stanaway* review was clear error under these facts.

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<sup>30</sup> It should be noted that the new evidence showing that Theo was an accomplished liar is bolstered by more evidence never before heard by the jury. On appeal, this attorney has procured multiple affidavits from potential witnesses. App pp. 532a – 548a. These witnesses portray Theo as a liar who would seek attention by any means necessary. This evidence is further proof that Theo lied to achieve his goals, whether it be getting out of trouble or receiving attention.

The *Grissom* test, while worded differently, still boils down to the heart of the issue under *Pennsylvania v Ritchie* and *People v Fink*. That is, whether the newly discovered evidence would have made a difference at trial (the fourth prong).

The reports establish that Theo, the complainant in this case, consistently lied. He lied to get out of trouble. The reports indicate Theo blamed his own improper behavior on the closest adult around him. The report went as far as to explain that “Theo seems to be attracted to situations that cause trouble for himself. He has been caught in the middle of telling lies so often that it’s difficult to know when he is telling the truth.” It was further reported that “Theo’s sense of what is real does not match what the majority of us see as reality. He seems to really believe some of his untruthful statements.” The information concerning Theo’s inability to understand the difference between his own lies and the truth, coupled with his propensity to blame nearby adult figures for his own mistakes clearly undermines confidence in the outcome of Mr. Tomasik’s trial.

In *People v Armstrong*, 490 Mich 281, 806 NW2d 676 (2011), this Court considered the significance of impeachment evidence and its use as grounds for granting a new trial. The *Armstrong* court concluded that a defense attorney's failure to introduce telephone records that contradicted the complainant's trial testimony amounted to ineffective assistance of counsel and was sufficient for a new trial. This Court specifically noted the importance of evidence attacking the complainant's credibility because “[t]he defense's whole theory of the case was that the complainant had falsely accused defendant of rape. The attacks on the complainant's credibility at trial were inconclusive, providing mere ‘he said, she said’ testimony contradicting the complainant's version of the events.” *Id.* at 291. Thus, the impeachment evidence was found to be sufficiently important to the determination of guilt or innocence that it could change the result

on retrial. In these circumstances, the *Armstrong* Court held that defendant was entitled to a new trial.

Similarly, this case was a straight-up credibility contest. A determination of Theo's credibility was the main function of the jury in this case. And the newly discovered evidence in this case surely would have had a dramatic impact on that determination.

In *United States v Agurs*, 427 US 97, 112-113; 96 S Ct 2392; 49 L Ed 2d 342 (1976), the court stated:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. **On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.** [Emphasis added.]

Here, the verdict was already of questionable validity. Theo had gotten into some serious trouble with thefts in school, and had made up a fantastic, uncorroborated claim that Dennis Tomasik, who had no prior criminal record, and no history of pedophilia, had molested him a decade earlier. The accusation proved to be highly inconsistent over time. Theo, though the numbers changed constantly, claimed he was brutally raped as much as 300 times over a two-year period in the tiny Tomasik home, screaming a lot, while the rest of the Tomasik family did nothing, even suggesting that the entire Tomasik family “knew what was going on” (T III 69). However, many in the neighborhood would have testified that 1) the accuser was almost never at the Tomasik home during the period in question and 2) Dennis Tomasik was almost never home during the relevant time frames. Work records corroborate this. And a Ph.D. forensic psychologist has laid out a strong case of false allegation. Appellant has shown that “expert”

testimony used by the prosecution to bolster the testimony of the complainant and discredit Appellant should never have been heard by the jury (see Issue II). Furthermore, the jury was allowed to hear improper evidence that the detective in this case believed that Appellant was guilty (see Issue I).

There can be no doubt that the addition of psychological reports showing Theo's inability to tell the difference between the truth and a lie is enough to clearly demonstrate that there is more than a reasonable probability of a different result at trial. The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. *Delaware v Fensterer*, 474 US 15, 18-19; 106 S Ct 292, 294; 88 L Ed2d 15 (1985) (per curiam). Appellant contends that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination. Appellant could not effectively question Theo or the "expert" witnesses because, without the material recently turned over, he did not know which types of questions would best expose the weaknesses in their testimony.

Had the files been disclosed, Appellant would have been able to show that Theo was a habitual liar. Of course, the right to cross examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable. *United States v Abel*, 469 US 45, 50; 105 S Ct 465; 468, 83 L Ed 2d 450 (1984); *Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105, 1110; 39 L Ed 2d 347 (1974). Because this type of evidence can make the difference between conviction and acquittal, see *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 1177, 3 L Ed 2d 1217 (1959), the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial. See *United States v Inadi*, 475 US 387, 396; 106 S Ct 112; 89 L Ed 2d 390 (1986).

It is clear that the information in the recently released records is favorable to the defense and material to the case. The records directly attacked Theo's credibility, clearly putting the whole case in such a different light so as to undermine confidence in the verdict and make a different result probable on retrial. It was constitutional error that Mr. Tomasik was not provided these documents before trial, and, as such, it cannot be considered harmless. *Kyles, supra* at 436.

This new evidence, when looked at cumulatively in context of a verdict which was already of questionable validity, compels a finding that Mr. Tomasik did not receive his due process right to a fair trial.

**IV. APPELLANT TOMASIK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (US CONST, AM VI; CONST 1963, ART 1, § 20) WHERE TRIAL COUNSEL FAILED TO: INVESTIGATE AND PRESENT A PSYCHOLOGICAL EXPERT ON KEY ISSUES SUPPORTING THE DEFENSE; INVESTIGATE, INTERVIEW, OR CALL POTENTIAL DEFENSE WITNESSES; PROPERLY INITIATE AND CONCLUDE REVIEW OF REPORTS AND RECORDS; PROPERLY CROSS-EXAMINE COMPLAINANT ON PRIOR INCONSISTENT STATEMENTS; AND OBJECT TO THE INTRODUCTION OF INADMISSIBLE AND HIGHLY PREJUDICIAL EVIDENCE**

**STANDARD OF REVIEW:** Ineffective assistance of counsel claims are reviewed de novo. *People v Pickens*, 446 Mich 298, 359; 521 NW2d 797, 826 (1994).

**ISSUE PRESERVATION:** Appellant could not have preserved this issue at trial as it is asserted that trial counsel was ineffective. The issue was preserved by way of a motion for new trial and repeated requests for a full *Ginther* hearing; a partial *Ginther* hearing has been conducted.

In *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court set out the standard for determining whether counsel was constitutionally effective. The *Strickland* standard for judging ineffective assistance of counsel has two components, performance and prejudice: “First, the Petitioner must show that counsel’s performance was deficient ... Second, the Petitioner must show that the deficient performance prejudiced the defense.” *Id.* at 687.

The *Strickland* Court stressed the importance of assessing the totality of the evidence as “a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 695-696. The *Strickland* standard has been adopted in Michigan. *Pickens, supra*.

In this case there is no corroborating evidence. The lack of physical or corroborating evidence should be taken into account in assessing the *Strickland* prejudice prong.

This is especially true where a middle-aged, married tool technician with no criminal history or suggestion of pedophilia is accused by a very troubled young man. A young man who had been treated for a number of psychological disorders (PE 3/31/06 20-22; App pp. 149a – 151a), had abused drugs (T III 106; App p. 230a), had a reputation as one who lied to get attention (App pp. 532a – 547a), was facing criminal conviction from a videotaped larceny (T III 48; App p. 172a), and was in counseling with a sex therapist who thought Theo had the markings of a sexually abused child and geared her counseling to accommodate her diagnosis (T IV 106-110; App pp. 245a – 263a). Once Theo disclosed the abuse he was able to hit the “reset button” on his life and shift all the blame for being what he called a “demon child” (T III 42; App p. 166a) to Mr. Tomasik. The evidence of guilt in this case was far from overwhelming; in fact it was weak. In essence, this trial was a credibility contest.

**A. Failure to investigate and prepare for trial**

In *Strickland, supra* at 690-691, the Court emphasized the need for complete investigation. See also, *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

There is no failure of advocacy more basic, or damaging, than the failure to pursue and present a substantial defense. *Washington v Texas*, 338 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). The present case presents a clear example of a failure to investigate rising to ineffective assistance of counsel. Mr. Nunzio had 13 months to prepare for trial, and he did no investigation. He did not investigate hiring a psychologist to counter the team of prosecution experts. He did not investigate critical work records which showed Appellant was rarely home during the years in question. He failed to contact a single potential defense witness who could have provided vital information attacking the complainant and his story. **Mr. Nunzio even failed to speak with the witnesses he called before they were on the stand.**

The *Srickland* test is met over and over with each failure. It was unreasonable not to investigate this case, and these failures severely prejudiced Mr. Tomasik. By not investigating this case or presenting a defense, Mr. Nunzio allowed the testimony presented by the prosecution to be admitted with little or no challenge, suggesting tacitly that the prosecution's theory was unimpeachable. Trial counsel's failures essentially left Appellant with no defense and yet, this was still a close case. Had Mr. Nunzio investigated even one of the following aspects, it is likely that Appellant would not have been convicted.

**B. Failure to investigate the use of expert witnesses**

Trial counsel failed to investigate and bring in a forensic psychologist to interpret the clear indicators of false allegation in this case (MT 12/18/08 87-112; App pp. 432a – 457a). This failure was inexcusable, especially considering that counsel knew that the prosecution was going to present two “experts” to discuss psychological concepts (Cottrell and Schaefer-Space) (*Id.* at 100; App p. 445a). Counsel simply dropped the ball on this, a serious investigatory failure.

At the *Ginther* hearing, Mr. Nunzio claimed that he did not **contact** a psychologist because he knew what the prosecution's psychological expert, Tom Cottrell, would testify to, and because Cottrell's testimony was unassailable (*Id.* at 105-108; App pp. 450a – 453a).

Mr. Nunzio stated “I have had his [Cottrell's] transcripts from the past. I have reviewed them. I know how he testifies” (*Id.* at 129; App p. 474a). Insight into the prosecution expert's testimony should be a reason one *should* contact an expert, not an excuse not to do so. Such critical information would be invaluable in working with an expert to attack the credibility and premise of the expert testimony.

Mr. Nunzio also testified that he did not bother to contact an expert because the prosecution's case would have, in some way, been aided by calling a defense expert:

[G]etting a psychologist, quite frankly, would have, in my opinion, benefitted the prosecution, because a psychologist, a learned

psychologist who has the experience and who's been qualified as an expert like Tom Cottrell, would have benefitted the prosecution in terms of agreeing with the offender dynamics presented as Tom Cottrell did in the course of this case, as well as the circumstances surrounding the delayed reporting in this case. (*Id.* at 107; App p. 452a)

Not calling an expert who could have rebutted the majority of the prosecution's expert's testimony because that expert may have agreed with a few general propositions about offender dynamics and delayed reporting cannot be considered a "strategy." It was not reasonable to ignore such compelling testimony that would have completely changed this case. Furthermore, offender dynamics and delayed reporting were not even central themes in this trial. Somehow, the Court of Appeals held Mr. Nunzio's decision to neglect even contacting an expert was sound because there potentially could have been a few ancillary points on which a defense expert might agree with the prosecution expert (App p. 99a). This conclusion was clearly erroneous and in conflict with decisions of this Court, the Michigan Court of Appeals and the United States Supreme Court.

The main thrust of an expert defense psychologist in this case would have been to attack the credibility and the veracity of the allegations of the complainant, Theo Jensen, as well as to counter the theories being espoused by the prosecution experts. The only feasible way that one could assume that the powerful testimony presented by Dr. Kieliszewski would have benefitted the prosecution's case would be to have failed to investigate and/or understand the potential testimony, which is exactly what happened here. Mr. Nunzio admitted he did not know what was meant by the terms clinician's illusion or confirmatory bias (MT 12/18/08 109; App p. 454a). Instead of any sort of investigation, Mr. Nunzio simply failed to do anything because he did not feel it was necessary.

Even if Mr. Nunzio's attempts to cover his inept representation had a scintilla of legitimacy, the *Strickland* Court emphasized the importance of counsel's investigatory duties,

and, though agreeing that strategic choices made “after thorough investigation of law and facts relevant to plausible options” are sacrosanct, “choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland, supra* at 690-691.

The failure to even consult an expert violated counsel’s duty to conduct a reasonable, diligent investigation of the case, and amounted to ineffective assistance of counsel. *Wiggins v Smith*, 539 US 510, 524; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Mr. Nunzio had the responsibility of defending a middle-aged man who was a well-respected tool technician with no criminal history or suggestion of pedophilia, and who lived with his loving wife and two accomplished teenage children, from charges that he repeatedly raped a young child a decade earlier. Yet Mr. Nunzio did not consult with a forensic clinical psychologist to even determine if there was anything which might help protect his client.

He didn’t believe he needed to consult with a forensic psychologist even though this case was laden with psychological issues. Mr. Tomasik’s accuser was a very troubled young man. A young man who had been treated for a number of psychological disorders (PE 3/31/06 20-22; App pp. 149a – 151a), had abused drugs (T III 105-106; App p. 230a), had seen many counselors throughout his life (PE 3/31/06 22; App p. 151a), was facing criminal conviction from a videotaped larceny (T III 48; App p. 172a), and was in counseling with a sex therapist who thought Theo had the markings of a sexually abused child (T IV 109; App pp. 245a – 263a) and geared her counseling to accommodate her diagnosis at the time of disclosure.<sup>31</sup> Mr. Nunzio’s “performance” was clearly deficient, satisfying the first prong of the *Strickland* test.

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<sup>31</sup> At the hearing, the prosecution argued a determination that Mr. Nunzio’s performance was deficient would create a situation where “in every case in every trial, a defense attorney is going to be held ineffective unless he hires a psychiatrist” (MT 2/12/09 46; App p. 391a). However, (footnote continued on next page)

There is no doubt that the second prong of the *Strickland* test, that the deficient performance prejudiced the defense, is also clearly met in this case. The only evidence of Appellant's guilt was the uncorroborated testimony of the troubled complainant. Thus, the entire case hinged on whether he was believable. The jury concluded that he was, but did so without the benefit of all the information brought forth by Dr. Kieliszewski at the evidentiary hearing (see Statement of Facts, at pp. 10 - 12).

The prosecution did attempt to bolster Theo's credibility through the use of psychological witnesses Julie Schaeffer-Space, Theo's counselor, and Thomas Cottrell, MSW, the vice president of counseling services at the YWCA counseling center. This testimony went uncontested at trial due to Mr. Nunzio's failures. Dr. Kieliszewski's testimony would have allowed Mr. Tomasik to attack the prosecution's case. The evidence provided by Dr. Kieliszewski is impactful, and the jury needed to hear it. This evidence would not have been diminished because Dr. Kieliszewski agreed with Dr. Cottrell regarding offender dynamics and delayed reporting, as suggested by the Court of Appeals. Again, these were not even contested points at trial. It was unreasonable not to even consult with an expert, and it severely prejudiced Mr. Tomasik.

Dr. Kieliszewski's testimony was substantial enough to create a different result. The jury was shown only one side of this case due to Mr. Nunzio's failures. It is critical that the evidence presented at the evidentiary hearings be provided to a new jury at another trial in order to preserve Mr. Tomasik's right to the effective assistance of counsel.

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that argument grossly oversimplifies the situation and fails to consider the actual facts of this case, or the overwhelming prevalence of psychological factors here.

**C. Failure to investigate, interview, or call potential witnesses; to interview or prepare witnesses called to testify; or to investigate or obtain Appellant's work records**

Trial counsel was ineffective for not investigating, interviewing or calling a number of potential defense witnesses, as well as for not obtaining Appellant's work records. Failure to present witnesses who may testify favorably on behalf of the defendant can constitute ineffective assistance where their testimony could have changed the outcome of the case. See *People v Johnson*, 451 Mich 115, 120-121, 124; 545 NW2d 637 (1996). Mr. Tomasik, along with his wife Kim Tomasik, repeatedly pleaded with Mr. Nunzio to contact the numerous potential witnesses (App pp. 530a – 533a).<sup>32</sup> Mr. Nunzio, over and over again, told the Tomasiks that he would either contact them himself or hire an investigator to do so. He claimed he liked to wait until just before trial, but the trial came and went without Mr. Nunzio contacting a single potential defense witness (*Id.*).

In this case, where credibility was the key issue, the value of character witnesses for the defense cannot be overestimated. It was particularly important to present witnesses because the prosecution corroborated the complainant's testimony only with "expert" testimony, and not physical evidence or other fact witnesses.<sup>33</sup> The jury heard Theo tell his story, and expert witnesses supported his claim. But the jury never heard from defense witnesses who could have, layer by layer, attacked the veracity of Theo's story.

The first prong of *Strickland* is clearly satisfied. Affidavits from all the potential witnesses show that Mr. Nunzio **failed to even contact any of them** (App pp. 535a – 556a). Considering that this case was a credibility contest, it was not reasonable for Mr. Nunzio to

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<sup>32</sup> While Mr. and Ms. Tomasik were not called to the stand during the *Ginther* hearing, the scope of the hearing would not have allowed them to comment on Mr. Nunzio's failures to contact additional witnesses. As such, their affidavits remain valid on this point.

<sup>33</sup> The expert testimony was improperly admitted, see Issue II.

ignore potential witnesses who could have attacked Theo's character and the truth of his story. Mr. Nunzio did not have to work to track down the potential witnesses. The Tomasiks had prepared a list for him, complete with addresses and phone numbers. The prosecution even helped out by providing a preview of what the witnesses might have to say about the case. **Mr. Nunzio did not even bother to interview the witnesses he did call to the stand.**

The second prong of *Strickland* is also easily met here as Mr. Tomasik was prejudiced by the failure of trial counsel to investigate the case. There are numerous affidavits of potential witnesses who could have provided critical evidence attacking the credibility and character of Theo Jensen, rebuking his fantastic claims, and creating potential defenses (App pp. 534a – 555a). The Court of Appeals held that this evidence was cumulative because Appellant's wife and child testified to most of what the dozens of potential witnesses would have confirmed (; App p.100a). However, it is indisputable that the testimony of family is not given the same weight as evidence of unbiased witnesses.<sup>34</sup>

**D. Neither Theo nor Mr. Tomasik was at the house enough to make Theo's claims plausible**

A key part of Theo's story is that he was "best friends" with Ethan Tomasik (T III 34, 72; App pp. 158a, 196a). It allowed Theo to explain why he was at the Tomasik house up to five times a week for the two years in question. Theo also claimed that the reason he continued to go to the Tomasik house, despite being systematically abused almost every time he was there, was because of his friendship with Ethan (T III 72; App p. 196a). It was critical for the prosecution to show that Theo was consistently at the house because Theo has alleged that he was abused anywhere from 50 times to over 300 times by Mr. Tomasik.

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<sup>34</sup> Many of the potential witnesses no longer have any contact with the Tomasik family.

However, potential witnesses could have explained to the jury that Theo was rarely at the Tomasik house, and that Theo and Ethan were not even close friends, let alone best friends.<sup>35</sup> Jason Barringer,<sup>36</sup> Jamin Bultman, and Travis Kusmierski would have told the jury that they were good friends with Ethan and they rarely, if ever, saw Theo around, much less in, the Tomasik home (App pp. 535a – 538a).

These were kids who lived in the neighborhood who knew Ethan and Theo well. They knew who hung out together and who did not. And all of these kids are certain that Theo did not hang out with Ethan. The adults from the neighborhood also know that Theo was not at the Tomasik house. See affidavits of Maurine Barringer and Cathy Meyer (App pp. 546a, 541a).

Potential witnesses can also show that Mr. Tomasik was not at his home very often, especially during the times Theo was likely to have been there. He worked long hours as a tool technician, but due to Nunzio's failures, the jury never heard any information regarding Mr. Tomasik's employment.

This information was critical for two reasons. First, it would have been vital to counter Theo's claims that he was abused an amazing number of times. It would have been virtually impossible for a man who worked as much as Mr. Tomasik to be able to abuse a child as many times as Theo alleges.<sup>37</sup> He worked anywhere from 40-80 hours each week, and he worked until

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<sup>35</sup> At trial Ethan testified that he was not close friends with Theo, but Ethan was discredited when the prosecution pulled pictures from the complainant's mother's purse apparently showing that Ethan had once been to Theo's birthday party just after Ethan had testified to the contrary ( T IV 135-138; 142; App pp. 267a – 270a). This provides further evidence that the Court of Appeals' logic was flawed in holding that the potential witness testimony would have been cumulative.

<sup>36</sup> Jason did testify at trial, but was never contacted beforehand by Mr. Nunzio. Having no idea what he would be asked at trial, Jason testified that he could not remember how often he was at the Tomasik house (T IV 127; App p. 264a).

<sup>37</sup> At trial, Theo was never forced to specify his latest version of the story in regard to a total number of times. However, part of the ineffectiveness of Mr. Nunzio was his failure to adequately cross-examine Theo on this point. It cannot be said to be immaterial for him not to  
(footnote continued on next page)

late at night as evidenced by the work records,<sup>38</sup> along with the testimony from potential defense witnesses.

The fact that Mr. Tomasik worked long hours is important, but the specific hours he worked was critical to his defense. Though Theo never indicated a time-frame for these alleged rapes, one would logically conclude that a child between 6-8 years old would likely spend time playing at a friend's house after school, during the early to mid-afternoon hours. During the summer, the time-frame would have likely expanded to be between mid-morning and early-evening. There is no indication that Theo stayed at the Tomasik house late into the night.

Mr. Tomasik worked odd hours and was virtually never home during these time-frames. All of Appellant's co-workers would have testified at trial that Appellant began work each day between 9 a.m. and 11 a.m. and was not even supposed to leave until around 7 p.m., but that Mr. Tomasik almost always stayed on later. (App. 548a – 556a). The testimony of the co-workers is corroborated by every potential fact-witness from the neighborhood who would have testified that Mr. Tomasik did not arrive home until late at night<sup>39</sup> (App. 535a – 547a).

The second reason it was critical for the jury to hear testimony concerning Mr. Tomasik's work is because it would have provided evidence of Mr. Tomasik's good and stable character.

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*(footnote continued from previous page)*

have obtained the work records and to have pursued an alibi defense based on the frequency of the alleged abuses simply because he was negligent in not eliciting the framework of the defense on cross-exam.

<sup>38</sup> The work records from Nicholas Plastics which have the total number of hours worked by Appellant each week for the three relevant years are found at Appellant's Appendix at pp. 557a-715a. These, in combination with the affidavits of a select few of his co-workers establish that Mr. Tomasik was rarely home until late in the evening.

<sup>39</sup> There are nine affidavits from witnesses from the neighborhood who mention Mr. Tomasik's work schedule, and they unanimously state that he worked long hours and that he did not get home until late at night.

#### **E. Theo's character for untruthfulness**

Mr. Nunzio's failure to contact potential witnesses also precluded the jury from hearing testimony contrasting Mr. Tomasik's good character with Theo's reputation as a liar who would do anything to get attention, including getting others into trouble. This line of testimony would have been admissible at trial. Either side is allowed to attack the credibility of the other side's witnesses at any time, with reputation or opinion evidence of the witness's character for untruthfulness. MRE 608(a). Under this rule, if a witness testifies, then opinion or reputation evidence of that witness's character for untruthfulness may always be presented, whether or not that witness's character for truthfulness has first been attacked. *United States v Walker*, 313 F2d 236, 239 (CA 6, 1963); *People v Rose*, 268 Mich 529, 534-535; 256 NW 536 (1934).

All of the potential witnesses would give their opinion that Mr. Tomasik is a wonderful person, and Theo Jensen is an untrustworthy liar. Jason Barringer stated that Theo was always "seeking attention by any means necessary," including lying (App p. 535a). Julie Meyer and Sam VandenBroek would also testify that Theo had a reputation for dishonesty in their neighborhood (App pp. 539a – 540a). This is just a small sampling of the unanimous testimony that Theo lied to achieve his goals, whether it be getting out of trouble or receiving attention.

Failure to interview witnesses cannot be considered strategic. It would have been beneficial to Mr. Tomasik's defense to call any of the potential witnesses. The Court of Appeals held, without the benefit of the witness testimony, that the potential evidence presented here is cumulative,<sup>40</sup> but an attorney's failure to call witnesses has been found by this Court to constitute

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<sup>40</sup> As pointed out in the Court of Appeals opinion, there was some testimony at trial pertaining to a few of the points discussed above, but the witnesses were discredited either through inconsistent statements, potential biases or both. Most of the potential witnesses are unbiased people who simply lived in the neighborhood.

ineffective assistance, requiring a new trial, even where some of the testimony was cumulative. *Johnson, supra* at 120-121, 124.

Failure to interview witnesses at all, as opposed to failure to call them, is not strategic. Mr. Nunzio's complete failure to contact witnesses, even the ones randomly called to the stand, is tremendously disturbing, but even more important was the fact that these witnesses would have provided a substantial defense to the instant charge. The potential witnesses would have systematically dismantled Theo's credibility, his story and, in the process, the prosecution's case.

**F. Failure to investigate and take necessary steps to obtain psychiatric and counseling records**

Counsel failed to adequately assess the complainant's treatment history and, given the triggering facts suggesting a false allegation present here, failed to work up specific criteria and demand an in camera review by the trial court of all treatment, counseling, and educational records. See Issue III.

Trial defense counsel's failures in relation to uncovering material for a *Stanaway* in camera review are also investigatory in nature, and are covered by the case law cited above. In this case trial counsel should have understood, and certainly should have uncovered, that the complainant, Theo Jensen, had been treated extensively by therapists due to his troubled past. Indeed, the record reflects that as many as eight other therapists besides Ms. Schaefer-Space treated this child for various disorders, including ADHD and ADD. The failure to seek out these records and request a *Stanaway* review was clear error under these facts.

And we now know that this error was outcome-determinative. We know this because, after conducting a *Stanaway* review, this Court recognized the critical nature of two reports and ordered the trial court to turn them over to Appellant.

**G. Failure to effectively cross-examine the complainant regarding the multiple inconsistencies in his story**

Trial counsel's failure to elicit critical information of prior inconsistent statements made by the complainant in this case satisfies both *Strickland* prongs and constitutes ineffective assistance of counsel. Theo gave a very different version of events at the preliminary examination than he did during his initial interview with Detective Martin. He gave a third version of his story at trial (See Statement of Facts pp. 2 to 5).

The differences in Theo's testimony are significant in two respects: the prior inconsistent statements call into question both Theo's credibility and the accuracy of his recall of the actual events. It is a basic rule of evidence that a witness may be impeached with a prior inconsistent statement. This is a traditional and important truth-seeking device of the adversarial process. See *Harris v New York*, 401 US 222, 225; 91 S Ct 643; 28 L Ed 2d 1 (1971); MRE 613.

Numerous cases have found ineffectiveness for failure to impeach key witnesses, See, e.g., *Driscoll v Delo*, 71 F3d 701, 710 (CA 8, 1996) (failure to question witness with prior inconsistent statement made to investigators constituted deficient performance); *Blackburn v Foltz*, 828 F2d 1177, 1183-84 (CA 6, 1987) (counsel deficient where he failed to impeach an eyewitness with previous inconsistent identification; *Sparman v Edwards*, 26 F Supp 2d 450, 454-55 (EDNY, 1997) (finding counsel ineffective when he failed to cross-examine child sexual abuse victims about inconsistent statements made to the police).

While a decision not to impeach a witness, or to elicit their prior testimony, can be a matter of trial strategy, such strategy must be reasonable to defeat a claim of ineffective assistance. See *Harris v Artiz*, 288 F Supp 2d 247, 257-260 (EDNY, 2003) (finding counsel ineffective where he failed to impeach the credibility of witnesses with evidence that would have aided defense's theory of misidentification; this could not be dismissed as trial strategy, as there would have been no downside). See also, *People v Dalessandro*, 165 Mich App 569, 578; 419

NW2d 609 (1988).

There was no reasonable trial strategy which would explain trial counsel's failure to impeach Theo with his numerous inconsistent statements. The Court of Appeals held that Mr. Nunzio's failure to adequately cross examine Theo regarding all the inconsistencies did not prejudice Appellant because "trial counsel did cross-examine T.J. on numerous other subjects to impeach T.J.'s credibility" (App p. 101a). However, this entire case hinged on Theo's credibility and the prior inconsistent stories told to both Detective Martin and at the preliminary exam would have provided critical evidence that Theo was fabricating his story. Defendant clearly meets the requisite standard of prejudice. It is likely that, had the jury been aware of the vastly conflicting stories in this case, they would have reached a different conclusion. Mr. Nunzio's failure to fully and adequately cross-examine Theo deprived the jury the chance to hear critical evidence.

With no corroborating evidence or fact witnesses, the jury convicted Mr. Tomasik because they believed Theo's story. The verdict would have been different had they known how many different stories Theo had given. Reversal is required.

**H. Failure to object to the introduction into evidence of the highly prejudicial CD of the police interview with Mr. Tomasik and failure to object to the introduction of improper CSAAS evidence**

Trial counsel was ineffective for failing to object to the introduction of improper CSAAS testimony of Thomas Cottrell, as well as the highly prejudicial and inadmissible CD of Detective Martin's interview with Appellant. Trial counsel's failure to object to inadmissible evidence can be constitutionally ineffective assistance warranting a new trial where the deficient performance deprived the defendant of a fair trial. See generally, *Northrop v Trippett*, 265 F3d 372 (CA 6, 2001) (Fourth Amendment violation); *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996) (improper other acts evidence).

The improper CSAAS evidence was highly prejudicial against Mr. Tomasik.<sup>41</sup> The jury heard Thomas Cottrell vouch for Theo's credibility, which was pivotal in this case. This evidence was necessary in this credibility contest without any corroborating physical evidence or fact witnesses. There can also be no doubt of the impact that the interrogation CD had on the jury.<sup>42</sup> Theo's story was given credibility through improper expert witnesses, but even Cottrell could not come right out and say what Detective Martin was able to say on the CD - that Theo was telling the truth because his allegation had been thoroughly investigated, and that Mr. Tomasik was guilty.

**I. The cumulative effect of the errors by Mr. Tomasik's trial counsel denied Appellant a fair trial**

Due Process requires that a criminal defendant receive a fair trial. US Const, Ams V, XIV; Const 1963, art 1, §§ 17, 20. The cumulative effect of individual errors may be so prejudicial that the defendant is denied a fair trial. This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Smith*, 363 Mich 157, 164; 108 NW2d 751 (1961); see also *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987) (where the court stated that the test is not whether there were irregularities at trial but whether defendant was denied a fair trial because of the irregularities).

Trial counsel's failure to subject the prosecution's case to "meaningful adversarial testing" through presentation of witnesses and other exculpatory evidence resulted in a fundamentally unfair trial. Under the circumstances of this case, confidence in the outcome of the trial would be misplaced. Because trial counsel's errors, considered individually or

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<sup>41</sup> See Issue II.

<sup>42</sup> See Issue I.

cumulatively, unfairly prejudiced Defendant and denied him a fair trial, his conviction must be reversed and his case remanded for a new trial.

**RELIEF REQUESTED**

For the foregoing reasons, Appellant Dennis Lee Tomasik respectfully urges this Court to reverse his convictions for criminal sexual conduct.

Respectfully submitted,

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